El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| J. R. NORTON COMPANY, | ) | Case Nos. 80-CE-16-EC |
| | ) | 80-CE-40-EC |
| Respondent, | ) | 80-CE-98-EC |
| | ) | 80-CE-132-EC |
| and | ) | 80-CE-133-EC |
| | ) | 80-CE-134-EC |
| UNITED FARM WORKERS OF AMERICA, AFL-CIO, | ) | 80-CE-150-EC |
| | ) | 80-CE-150-1-EC |
| | ) | 80-CE-157-EC |
| Charging Party. | ) | 80-CE-195-EC |
| | ) | |
| | | 9 ALRB No. 18 |

DECISION AND ORDER

On January 22, 1982, Administrative Law Judge (ALJ)[1/] Marvin J. Brenner issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent, and the United Farm Workers of America, AFL-CIO (UFW) each timely filed exceptions to the ALJ's Decision and a supporting brief, and General Counsel and the UFW each filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (ALRB) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings and

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] All section references herein refer to the California Labor Code unless otherwise indicated.

conclusions, as modified herein.

Eladio Aguirre and Alberto Sanchez

The General Counsel and the UFW except to the ALJ's conclusions that Aguirre and Sanchez were not refused rehire by Respondent's agents, Pedro Juarez and Raul Ramirez, in November and December 1979 because of Aguirre's and Sanchez' support for the UFW or because of their participation in concerted protests over working conditions.

The ALJ found that Aguirre and Sanchez engaged in minimal union activity, remote in time from the refusals to rehire, and that they made only minor complaints about working conditions. The ALJ further found that there was inadequate proof that Respondent had significantly changed its hiring practices in a manner that discriminated against Aguirre and Sanchez. The ALJ gave little weight to statements allegedly made by Respondent's foremen to the effect that they had been instructed by "higher ups" not to rehire Aguirre or Sanchez.

The General Counsel and UFW argue that there is sufficient evidence that Respondent's hiring practices were different in November and December 1979 than in prior seasons. They also argue that much of the evidence of Respondent's prior hiring practices was adduced in an earlier case involving Respondent. (See J. R. Norton Co. (1982) 8 ALRB No. 76.) General Counsel and the UFW also argue that the union activity of Aguirre and Sanchez, although limited, was sufficient to identify them with the seniority workers who had engaged in work stoppages in Salinas in August 1979 and who were subsequently refused rehire as a

group and that the statements by foremen are direct evidence of Respondent's discriminatory intent. The causal connection, they argue, is made by the closeness in time between the Salinas strike, the pattern of refusals to rehire shown in the other J. R. Norton case, and the refusals to rehire in the instant matter at the beginning of the 1979 lettuce harvests in Blythe and the Imperial Valley. We find merit in these arguments.

Respondent grows lettuce in Salinas, New Mexico, Arizona Blythe, and the Imperial Valley. The harvest seasons at those locations occur in an approximately consecutive pattern, so that each harvest begins when a previous one ends. Many of Respondent's employees work in several of the locations and follow the harvest from place to place. Workers learn about and apply for work in an upcoming harvest by asking at the end of the previous harvest, by calling or visiting foremen at their homes, or by appearing at one or more of various meeting places, shortly before the harvest is expected to begin.

There is some dispute over whether, prior to October 1979, Respondent considered seniority in deciding which workers to hire for upcoming harvests. The ALJ herein found that Respondent did not have a formal seniority list or recall procedure. He did find, however, that experience was a factor and, since Respondent always notified its workers from the immediately preceding harvest where and when to apply for work in the next harvest, there was a form of seniority system in effect. In J. R. Norton Co., supra, 8 ALRB No. 76, the Board found that Respondent's pattern of rehiring workers who followed its harvest

circuit was a seniority system and that seniority had a cumulative value, recognized by employee awards and measured by Respondent's employee identification number system. In August and September 1979 Respondent's Salinas lettuce harvest employees engaged in a series of work stoppages to persuade Respondent to begin contract negotiations. In the New Mexico harvest in October 1979 Respondent denied rehire to many of the employees who had participated in the Salinas strikes.

In J. R. Norton, supra, 8 ALRB No. 76, we found that Respondent discriminated against the Salinas strikers by changing not only the way it had previously notified seniority workers when and where to apply for work, but also its practice of according preference in hiring to workers with seniority. Those findings were based on the credited testimony of employee witnesses, including Ramon Diaz, a witness in the instant matter, regarding Respondent's prior hiring practices, and testimony describing statements of discriminatory intent made by Respondent's crew foremen, including Pedro Juarez.

The discriminatees herein, Aguirre and Sanchez, did not work in Salinas and did not engage in any strike activity. They had worked only in the Blythe and Imperial Valley harvests in prior years. However, when Aguirre first applied for work in the October 1979 Blythe harvest, he was in a group with Ramon Diaz, Juan Quintero, and other former Salinas workers who had been denied rehire in New Mexico. Sanchez sought work in the Blythe harvest by himself, but on the same day as Aguirre and the others by applying to foreman Juarez, a week before the

harvest began. Juarez reportedly replied that he would get back to Sanchez but did not do so. When Sanchez next applied for work, the crews were already filled.

Aguirre testified that when he applied for work in the Blythe harvest, the pusher for the Juarez crew, Raul Ramirez, told Aguirre and the others present that he had received orders not to hire them. Aguirre's testimony was corroborated by Ramon Diaz who was denied rehire at the same time. Ramirez denied even seeing Aguirre prior to the Blythe harvest.

The ALJ did not resolve that testimonial conflict because he found that Aguirre's prior union activity, which had occurred mostly in December 1978, was too remote. We disagree. Aguirre's testimony is consistent with Respondent's pattern of denying employees rehire simply for being associated with former Salinas workers. (See J. R. Norton Co., supra, 8 ALRB No. 76.)[3/] Moreover, as to personal credibility, Ramirez changed his testimony as to which workers he had seen in which places and gave inconsistent testimony about the amount of work available during the harvests. Aguirre's testimony, by contrast, was generally consistent and largely corroborated.[4/]

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[3/] See also J. R. Norton Co. (1982) 8 ALRB No. 89 where the Board concluded that Respondent engaged in group discrimination against former strikers when hiring for the 1980 Salinas harvest.

[4/] The ALJ discredits Aguirre's testimony that Juarez said he would not talk to Aguirre about jobs because of the charges which had been filed against Respondent. The ALJ's analysis goes too far. It is clear that Aguirre did not file his first charge until February 11, 1980, and therefore that Juarez could not have referred to that charge, or discriminated on the basis of

(fn. no. 4 cont. on p. 6.)

On balance, we credit Aguirre's version of Ramirez' statement because it is consistent with Respondent's prior acts of discrimination. We further find that Ramirez identified Aguirre with the former Salinas employees, with whom he applied for work, and therefore subjected him to the group discrimination described in our earlier Decision.

Sanchez presents a closer case. Sanchez was not in the company of any of the former Salinas workers when he applied for work in the Blythe harvest, although he testified that he applied on the same day as the others. Sanchez testified that he made a timely application in Blythe and was misinformed about where and when to ask again about the start of the harvest. Ramirez subsequently remarked to Sanchez in Calexico, on the first day of the Imperial Valley harvest, that he had received orders not to hire Sanchez or any other workers who had previously worked for Respondent. Ramirez testified that he did not recall talking to Sanchez in Calexico. Juarez also testified that he could not recall whether he had spoken to Sanchez about working in the Blythe or Imperial Valley harvests, stating only that many workers had applied for a small number of jobs.

We credit Sanchez' testimony regarding the aforesaid remark he attributed to Ramirez and also regarding Juarez' failure

(fn. 4 cont.)

that charge, in December 1979. However, many former employees had filed charges regarding refusal to rehire prior to December and it is probable that Juarez was aware of and concerned about those charges. Therefore, while Aguirre's testimony does not prove a violation of section 1153(d), it is not improbable on its face and does not warrant discrediting him as a witness.

to accurately inform Sanchez about when and where to apply for work in the next harvest. Sanchez' testimony was not specifically contradicted, since neither Ramirez nor Juarez recalled talking to Sanchez. Moreover, his testimony describes discriminatory conduct attributable to Respondent which is consistent with its prior acts of discrimination, which we found, based on credited testimony, in the previous, and similar, discrimination case against this Respondent. We therefore accept and credit Sanchez' testimony as true. (See Martori Brothers Distributors v. ALRB (1981) 29 Cal.3d 721, 728.)

Sanchez testified that Raul Ramirez told him there was no chance that he or other workers like him would be hired because Juarez had received orders "from higher up" to that effect. According to Sanchez, Ramirez also stated that if it were up to him, he would give employment to the experienced workers in preference to new people whom he did not know. Although those remarks do not directly refer to Sanchez' support for the UFW, they are very similar to remarks Respondent's supervisors made to the former Salinas strikers in New Mexico and Blythe and to nonstrikers, such as Aguirre, who were associated with the former Salinas strikers and/or otherwise supported the UFW. Given that pattern of conduct by Respondent and Sanchez' uncontradicted testimony about his open support for the UFW during lunch-time conversations, we infer from Ramirez' statements that Respondent's anti-union animus was the basis for its failure and refusal to rehire Sanchez for harvest work in Blythe and the Imperial Valley. Based on the above, we conclude that

Respondent violated section 1153(c) and (a) by its failure and refusal to rehire employees Alberto Sanchez and Eladio Aguirre.

ORDER

By authority of section 1160.3 of the Aguicultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent J. R. Norton Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to hire or rehire, reassigning to more onerous work, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) Engaging in surveillance of union organizers while said organizers are taking lawful access to communicate with Respondent's employees.

(c) Threatening any agricultural employee with any reprisal for filing charges with this agency.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

(a) Offer to Jose Espinoza, Eladio Aguirre, and Alberto Sanchez immediate and full reinstatement to their former

or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole Jose Espinoza, Eladio Aguirre, and Alberto Sanchez for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our decision in Lu-Ette Farms, Inc. (1980) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from October 1979 until the date on which the said Notice is mailed.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property

for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: April 15, 1983

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

MEMBER McCARTHY, Dissenting in Part:

The majority surmises that Eladio Aquirre and Alberto Sanchez were not rehired by Respondent in the Imperial Valley or in Blythe in the winter of 1979 because Respondent erroneously believed the two workers were among those who had engaged in a series of work stoppages at Respondent's Salinas area operations three months earlier. I cannot endorse the majority's "mistaken identity" theory. Rather, I would affirm the Administrative Law Judge's (ALJ) recommended dismissal, for the reasons stated by him, of the allegations in the complaint insofar as they allege that Aquirre and Sanchez were discriminatorily denied rehire in violation of Labor Code section 1153(c) and (a). Neither Aquirre nor Sanchez had ever worked in Salinas and their employment history was well known to the supervisors who advised them at the time of their application that Respondent was not in need of additional workers.

In J. R. Norton Company (1982) 8 ALRB No. 76, a

two-member majority of my colleagues found that Respondent retaliated against the Salinas work-stoppage participants by changing its hiring practices in subsequent seasons in order to impede their attempts to seek further employment.[1/] The majority's finding was based on an assumed premise that the work stoppages, although clearly concerted, were also protected activities within the meaning of section 1152 of the Agricultural Labor Relations Act (Act). I dissented from the failure of both the ALJ and the majority in that case to confront that essential element of the prima facie case[2/] and to make an express finding as to whether the activity was protected. The majority sought to overcome its failure to make that pivotal finding by suggesting that regardless of whether the activity was protected, Respondent had "condoned" the employees' conduct by failing to take immediate disciplinary action against them. I disagreed with the majority's application of the doctrine of condonation. Since condonation applies only to unprotected activity and violent acts, it makes no sense to find that Respondent could condone, i.e., forgive, a protected act.

I also dissent from the majority's conclusion that Respondent engaged in unlawful surveillance by its driver/ foreman's refusal, at the request of the United Farm Workers

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[1/] The ALJ in the instant matter considered this same issue and concluded that Respondent had not altered its hiring practices following the close of the Salinas season.

[2/] To find a prima facie case of unlawful discrimination, the Board must find that the employer knew or believed that the employees had engaged in a protected concerted activity and discriminated against them for that reason. (Lawrence Scarrone (1981) 7 ALRB No. 13.)

of America, AFL-CIO, (UFW) organizers, to disembark from a bus carrying Respondent's employees. The presence of the driver on the bus at that time was not shown to be inconsistent with the performance of his usual duties and there is no basis for inferring that his presence there was in any way out of the ordinary. (Two Wheel Corp., d/b/a Honda of Mineola (1975) 218 NLRB 436 [89 LRRM 1405].) Moreover, the organizers were taking post-certification access to Respondent's premises and there is no evidence that they had complied with the guidelines governing such access as set forth in O. P. Murphy Produce Co., Inc. (1978) 4 ALRB No. 106.

Dated: April 15, 1983

JOHN P. McCARTHY, Member

# NOTICE TO AGRICULTURAL EMPLOYEE

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by threatening an employee with reprisal for filing a charge and then assigning him to harder work, and by refusing to rehire three employees because of their union activity.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions:
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT threaten any employee with reprisal for filing charges with the ALRB.

WE WILL NOT engage in surveillance of UFW organizers when they lawfully enter the buses before work to speak to you.

WE WILL NOT reassign any employee to less desirable work, or refuse to rehire any employee, because he or she has engaged in union activity or any other protected concerted activity.

WE WILL offer Jose Espinoza, Eladio Aguirre, and Alberto Sanchez reinstatement to their former jobs without loss of seniority and we will pay them backpay for all economic losses they have suffered as a result of our refusal to rehire them.

Dated: J. R. NORTON COMPANY

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California, 92243. The telephone number is (714) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

CASE SUMMARY

J.R. Norton Company (UFW) 9 ALRB No. 18
Case No. 80-CE-16-EC, et al.

The complaint herein, based on charges filed by the United Farm Workers of America, AFL-CIO (UFW), alleged that Respondent, J.R. Norton, violated sections 1153(a), (c), and (d) of the Act by discharging Juan Zermeno and Atilano Jimenez and denying them vacation pay because of their union support, by interrogating Jimenez about his union activities and the filing of charges with the ALRB, by discharging and refusing to rehire Jose Espinoza, as well as directing him to do less desirable work because of his union support, by refusing to rehire Eladio Aguirre and Alberto Sanchez because of their union support, by making threats against Alejandro Martinez because of his union support, and by interfering with and surveillance of a union meeting.

ALO DECISION

The ALJ dismissed the allegations that employees Juan Zermeno, Atilano Jimenez, and Jose Arias were discriminatorily denied vacation benefits and that Respondent made threats of reprisal to Alejandro Martinez. No exceptions were filed as to dismissal of these allegations.

The ALJ also dismissed the allegations that Respondent unlawfully discharged Juan Zermeno and Atilano Zermeno on the ground that Respondent would have discharged them for their negligence on the job even absent their union activity. As to Jose Espinoza, the ALJ found that he was laid off for legitimate economic reasons, but that Respondent's failure to rehire Espinoza was unlawfully based on his union sympathies. The ALJ found no discriminatory refusal-to-rehire in the cases of Eladio Aguirre and Alberto Sanchez, since neither of those employees engaged in sufficient union activity to support a prima facie case.

BOARD DECISION

The Board adopted the ALJ's findings and conclusions, except as to Aguirre and Sanchez. The Board found that those employees were identified with the group of Salinas workers who were discriminatorily refused rehire after striking in August 1979 (See J.R. Norton Co. (1982) 8 ALRB No. 76), and concluded that Respondent's refusal-to-rehire Aguirre and Sanchez violated section 1153(c).

DISSENTING OPINION

Member McCarthy would adopt the Administrative Law Judge's dismissal of the complaint as to Eladio Aguirre and Alberto Sanchez. He questions the adequacy of the majority's finding that these workers were denied rehire solely because they mistakenly were identified as participants in intermittent work stoppages which occurred in Respondent's Salinas operations during

the preceding harvest season. He relies on the undisputed fact that both of the alleged discriminatees were well know to the supervisors from whom they sought rehire in Blythe as long time Company employees who had never worked in the Salinas Valley.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| In the Matter of: | ) | |
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| J. R. NORTON COMPANY, | ) | Case Nos. 80-CE-16-EC |
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| Charging Party. | ) | 80-CE-195-EC |
| | ) | |
| | ) | |

Appearances:

Gloria Barrios, Esq.
for General Counsel

Sarah A. Wolfe, Esq.
of Western Growers Association
for Respondent

Chris A. Schneider, Esq.
of United Farm Workers
for Charging Party

DECISION OF THE ADMINISTRATIVE LAW OFFICER

## STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Officer: This case was heard by me on January 27, 28, 29, 30, February 2, 3, 4, 5, 11, and 12, 1981. The First Amended Complaint issued on February 3, 1981 and alleged that Respondent, J.R. Norton, violated Sections 1153(a), (c), and (d) of the Agricultural Laobr Relations Act, hereinafter referred to as the "Act", by discharging Juan Zermeno, Atilano Jimenez and denying them vacation pay because of their union support, by interrogating Jimenez about his union activities and the filing of charges with the Agricultural Labor Relations Board, hereinafter referred to as the "ALRB," by discharging and refusing to rehire Jose Espinoza, as well as directing him to do less desirable work because of his union support, by refusing to rehire Eladio Aguirre and Alberto Sanchez because of their union support, by making threats against Alejandro Martinez because of his union support, and by interferring with and surveilling a union meeting.

The original complaint was filed on July 7, 1980 and was based on charges filed by the United Farm Workers of America, AFL-CIO (hereinafter called the "UFW" or the "Union"). An Answer was filed by Respondent on July 10, 1980, generally denying the allegations. Respondent admitted that the following individuals were supervisors within the meaning of Section 1140.4(j) of the Act: Phillip Mowbray, Jose Cardenas, Pedro Juarez, and Raul Ramirez. At the prehearing conference, it stipulated to the fact that Frank Silva and Antonio Roman were also supervisors.

All parties were given a full opportunity to present evidence[1/] and participate in the proceedings. The General Counsel and the Respondent filed briefs after the close of the hearing.

Upon the entire record, including by observation of the demeanor of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

## FINDINGS OF FACT

### I. Jurisdiction

Respondent, J.R. Norton, is an agricultural employer within the meaining of Section 1140.4(c) of the Act, as was admitted by Respondent in its Answer; and I so find.

Respondent also admitted in its Answer that the UFW was a labor organization within the meaning of Section 1140.4(f) of the Act, and was certified by the ALRB on August 10, 1977, as the

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1. Hereafter, General Counsel's exhibits will be identified as "G.C. Ex. __", Respondent's exhibits as "Resp's ___," and Charging Party's as "C.P. Ex __". Reference to the transcript will be indentified as "TR. __, p. __".

exclusive bargaining representative of Respondent's agricultural employees; and I so find.

## II. The Business Operation

Respondent is an agricultural employer whose business enterprise can be divided into two distinct segments, farming and harvesting, each of which is managed by different personnel.

### A. The Farming

The farming operation is year-round and located in the Imperial Valley at a place called the "Fillaree Ranch" where wheat, lettuce, alfalfa, cotton and Sudan grass are grown. The workers employed in the farming operation are classified as shovelers and sprinklers, irrigators, and tractor drivers.

Phillip Mowbray is the manager of Respondent's Imperial Valley operations and has held that position since approximately December, 1979. As such, he is responsible for the production of all lettuce up to the point of actual harvest. Mowbray has two foremen under him, Jose Cardenas and Frank Silva. Cardenas is the irrigation foreman and is responsible for the supervision of the irrigators and shovelers, including sprinkler pipe movers. Silva supervises the tractor drivers.

### B. The Harvesting

The harvesting segment of the business takes place at many locations throughout the year (Salinas, Chandler, etc.) but for purposes of this hearing, the relevant places are the fall Blythe and Imperial Valley harvests. There are actually two seasons in Blythe, one beginning in November and the other in February/March. The Imperial Valley season generally begins in late December or early January. Lettuce harvesting employees are usually classified as cutters, packers, closers and loaders.

### C. The Irrigators

The number of irrigators remains basically constant throughout the year because of the crop diversity. Mowbray testified there were usually seven to nine irrigators at the ranch year-round.

### D. The Shovelers/Sprinklers

This job classification varies throughout the year. The main work of shovelers, including sprinkler-pipe laborers, is from the last of September until approximately mid-November. During this time shovelers increase in number from four-five to twelve-fourteen; and when this work force is added to sprinklers, the number of employees climbs to twenty-five -- twenty-eight. After mid-November, the sprinkler-pipe crew is finished and generally will be the first to be laid off. In that there would still be some

shovel work to do in preparation for dirt ditches for irrigating the lettuce, many shovelers remain on the staff until February at which point, the lettuce irrigating being over, their numbers would be reduced. Mowbray testified that at that moment Respondent would still have retained all the irrigators and perhaps three-five shovelers at which level it would generally remain until September.[2/]

E. The Tractor Drivers

The number of tractor drivers year-round is kept somewhere betweeen three-five. The busy season is June when the summer tillage begins in preparation for the lettuce in late September and October and when that occurs, some drivers are hired back, usually around three, who might have been laid off during the non-peak period of February to June. Those rehired would remain employed through the end of October, after which there would be a short slow period in which some drivers might again be laid off from early November through the first part of December. Tractor drivers are then rehired[3/] and stay employed until the next slow period, which is approximately from the early or mid-part of February until the end of May.

F. Hiring

According to Mowbray, whether an individual worked for Respondent before would have nothing to do with his/her ability to be rehired. But if the company were hiring and there were two applicants who were equal in ability and one had worked at Respondent's before, preference would be given to that worker.

Cardenas testified that in hiring he would ask a worker if he/she had any experience (not necessarily experience with Respondent) in that job classification and would hire on that basis. But Cardenas also testified that if he personally knew the worker from before and approved of his work, he would be hired.

G. Layoff

Mowbray testified that when he decided whom to lay off, he looked at one thing first and this above all else -- the ability of the worker. However, if there were two workers of comparable ability, he would keep him/her who had been there the longest.

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2. Mowbray testified that cotton is planted after lettuce (March to mid-April or the first of May) but that since its timing is not as critical as lettuce, a work force of four-five shovelers could handle the job.

3. January and February are primarily tillage months for cotton.

Mowbray also testified that prior experience with Respondent led to rehire in the case of some tractor drivers and shovelers who had in the past been laid off for short periods of 1-2 months and who traditionally returned for work with Respondent when asked.

III. The Petition

Around the early part of January 1980, several year-round employees in the farming operation signed a petition calling upon Respondent to negotiate with the Union.[4] Although it is unclear when in January -- some testified it was December -- the document was signed, a review of Respondent's payroll records at the Fillaree Ranch, indicates that there were approximately twenty-one -- twenty-five workers employed during this month. (Resp's Ex. 23.) Of this number, nineteen signed the petition, a substantial majority.

4. It is to be noted that Respondent was held to be obligated to negotiate with the UFW by decision of the Supreme Court on December 12, 1979, in J.R. Norton v. Agricultural Labor Relations Board (1979) 26 Cal.3d 32.

IV. The Discharges

A. Juan Zermeno

1. Union Activities

Juan Zermeno testified that he had been a supporter of the UFW since 1975 and that in November or December of 1979 he was elected, along with two others, to the Negotiating Committee. Zermeno testified that he attended around four or five negotiating sessions but was unable to state with any particularity when they occurred, stating at first that the first meeting he attended was in the Autumn of 1980 and then later stating only that he attended negotiating sessions prior to the time he was discharged.[5]

Zermeno testified that he participated in other Union activities as well, such as passing out flyers and UFW buttons at Respondent's shop, adjacent to its office, and that foremen Jose Cardenas, Frank Silva and general foreman Buddy Larson had observed him so engaged. Asked when was the first time that he handed out leaflets, he initially said it occurred a long time before he was named to the Negotiating Committee, but then later testified that he started handing out leaflets in September 1979 and buttons around October 1979.

Zermeno further testified that in either December of 1979 or January of 1980 he presented a petition to Mowbray (G.C. Ex. 3) and that as soon as Mowbray became aware of the fact that the petition had something to do with the Union, he drove away rapidly in his pick-up. Zermeno also testified that Jesus Ramirez witnessed this event.[6] Zermeno testified that he and a co-worker, Atilano Jimenez, were the ones who originally gathered signatures for the petition.

2. The Incident

Zermeno testified that he was hired in August of 1978, that he had fourteen years experience as an irrigator, and that he had never been fired beofre. He testified he began his 24-hour shift on March 3, 1980, at 6:30 p.m. but received no orders at that time. He worked Field 18 and then commenced working on Field 14, an alfalfa field which he described as sandy with a lot of gophers. (In the past he had worked on Field 14 four or five times.) Zermeno testified that around noon on March 4, his foreman, Jose Cardenas,

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5. Charging Party Ex. 5, was a copy of all sign-in sheets for all negotiating sessions up to April 1980. It indicates that Zermeno attended negotiating sessions on February 6, 1980, February 27, 1980, and March 13, 1980.

6. Ramirez did not testify.

told him that he did not want the water to go to the reservoir, that he should put checks (or stops) along the melgas[7] so that the water would remain there and be kept from running downward, that he should close the drainages, and that he should place dirt in the drain.

Zermeno testified that the water was supposed to flow from the water gates southward through the melgas to the drain, and then downward (G.C. Ex. 11) but that in this case a gopher had made a hole which allowed water to accumulate in the drain and caused a "wash-out" or "cave-in". According to Zermeno, often gophers, working at night, would make holes in the middle of the melga, which were not visible to the irrigator because of the darkness and also because the height of the alfalfa obscured it from view.

Zermeno further explained that when he realized that the water was running backwards where the gopher had made the hole, he asked his co-worker, Jimenez, to help him close up the area; and they knocked down another border so that the water would then start running downwards and would not continue running backwards. (G.C. Ex. 11, points G and F.)

Following the incident and early that same morning, foreman Cardenas came and observed the damage. Zermeno testified that Cardenas told him that it wasn't anything that he should get frightened over, that he had seen worse things happen. Zermeno asked if he was going to be fired and Cardenas supposedly told him that it was not his fault, that it was Cardenas' fault, and that Cardenas would talk to Mowbray and would take the whole responsibility for the incident.

Zermeno testified that Cardenas told him to go home, rest and that he would be called later about returning to work. Zermeno testified he left the field between 7:30 - 8:00 a.m. and that around 9:00 a.m. he was called by Cardenas, told that Mowbray did not want him working there any longer and informed he was fired.

Zermeno also testified that he later spoke to Cardenas again about his termination at Respondent's shop when he went there to get his check. According to Zermeno, Cardenas said that he had told Mowbray that what had happened was not his (Zermeno's) fault, that it was his (Cardenas') fault because he had given Zermeno wrong orders, that he was sorry because Zermeno was a good workers, but that Mowbray had ordered the action that was taken. When asked by the ALO what was incorrect about the orders Cardenas gave him, Zermeno stated that he should not have been ordered to place the water stops because this blocked the water; and that if he hadn't placed the stops, the water would have gone downwards toward the reservoir where it was supposed to.

On the other hand, Zermeno admitted that when he received

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7. A "melga" is a portion of land between two borders.

the order from Cardenas to put in the water stops, he did not question it, went ahead and did it, and never indicated to Cardenas that in his opinion there might be a problem if Cardenas' advice were followed. When asked whether he realized that if he followed the orders of Cardenas, it might cause a cave-in, Zermeno responded: "Well, sometimes one will think about these things, but one never knows what will happen." (TR. 3, p. 118.)

Zermeno, also testified that he did not go home at all that night to eat and denied he ever told Cardenas this.

Alejandro Martinez testified that he was assigned the job of finishing the work on Field 14 Zermeno had started and that he commenced doing so at 6:30 a.m. that very morning. At that time, he testified that he was present during a conversation between Zermeno and Cardenas, that Zermeno had explained that a gopher had caused the wash-out, that Cardenas replied " . . . it can't be helped. . . ." (T.R. 3, p. 150), that Zermeno blamed the incident on Cardenas for requiring him to place water checks too high so that the water did not go into the ditch but came up higher, thereby reaching the gopher holes and causing the wash-out, and that Cardenas admitted that it was his fault and assured Zermeno that it wouldn't be a problem. But despite these representations, Martinez further testified that he and Cardenas conversed privately that very morning prior to the actual discharge of Zermeno, and that Cardenas had expressed the view to him that possibly Zermeno "had gone to his home or that he became careless". (TR. 4, p. 6.)

Cardenas testified on behalf of Respondent. An irrigator foreman for seventeen months, he testified that he had ten to eleven years experience in irrigation. Cardenas testified that at 6:30 a.m. on March 3, 1980, he made the following assignment to Zermeno: "You are going to irrigate Field No. 14, and it is necessary that you irrigate the first melgas that have been left a little dry in the other irrigation.[8] You will have to put a small border here where the drain is and after you irrigate these melgas, then you cut that border so that the water will run off to the drain. When you finish this field, you will go to No. 15." (TR. 3, p. 44.)

According to Cardenas, in order to run the water through the melgas, Zermeno would have had to open the lids on the canal and place a retention border in the drainage canal; and after the melgas got wet, he would have to cut down the borders so that the water could continue running out the drainage canal (Cardenas testified this process should have taken 1½-2 hours).

Cardenas testified that he checked the field where Zermeno

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8. Cardenas testified that the first melgas at the beginning of every field had always been left a little dry, that the rest of the field had been irrigated evenly, and that it was now time to irrigate the melgas, as well.

was working at 4;00 p.m., saw no problem, and left work shortly thereafter, leaving Zermeno to the work. Which he had assigned earlier that morning.

Cardenas then testified that he received a phone call at around 2:00 to 4:00 a.m. from Zermeno who said that the border had been washed away from the field. Cardenas went to Field 14 arriving at around 5:30 a.m. and that Zermeno told him at that time: "I went home to eat, and when I came back, this had happened." (TR. 3, p. 25.) Cardenas further testified that Zermeno was very worried and indicated that he feared that Mowbray would fire him, to which he (Cardenas) replied that he would talk to Mowbray and whatever he decided would stand.

Following this conversation with Zermeno, Cardenas testified he called Mowbray around 5:30 - 5:40 a.m., that Mowbray arrived about 6:10 a.m., that he (Cardenas) explained what had happened, and that Mowbray indicated that the employee should be fired and told Cardenas to fill out the necessary papers and to write an explanation. Cardenas said he informed Zermeno of his discharge at around 7:30 to 8:00 that morning, March 4.

Cardenas testified that in his view Zermeno had not followed instructions in that before he went home to eat,[9] he did not take the containing border down, which was an unusual thing for an irrigator to have failed to do. As a result, the water flowed from the cement canal around Field 14 when it should have gone down the drop box. He further stated that his order was correct and that Zermeno's failing was in not cutting down the border so that the water would run out. But Cardenas also made it clear that in his opinion, Zermeno was very good at performing all phases of irrigation work, had the ability to think things through, and could be left alone to decide what needed to be done. Cardenas said he was very sorry about the discharge but that there was nothing he could do; he was just following Mowbray's orders.

When asked whether other workers had done similar damage in the past, Cardenas testified that this one was bigger than others -- that in the past, small damage could be handled by a motor grater that Respondent owned in one or two hours, but that in Zermeno's case, Respondent had to call Merrill Ditch Liners to perform major repairs.[10]

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9. Cardenas testified that irrigators work twenty-four hour shifts and that during a shift the irrigator may go home, sometimes for as long as four to five hours, if conditions allow him to do so.

10. Merill Ditch-Liners is a Brawley, California, company which specializes in the repair of ditches, frequently from wash-outs. Its principal work is the installation of new ditches and irrigation systems.

Phillip Mowbray, the General Manager for the Fillaree Ranch, testified for Respondent that he had received a call early in the morning from Cardenas informing him that there had been a major wash-out[11] in Field 14[12] and that he responded that he would get out to the ranch early in the morning, take a look at what happened and decide what to do from there. Mowbray drove to the actual site himself at around 6:30 a.m. and testified he observed the damage which he described as a canyon-like hole where the road had been washed out and the bank washed into a cement ditch in Field 18, adjacent to Field No. 14.

Mowbray further testified that at that point he made up his mind that the damage was sufficient to warrant termination, asked Cardenas which employee it was who had been working on the particular field at the time the dammage occurred, and instructed Cardenas to discharge him. Mowbray did not speak to Zermeno and testified that he and he alone made the decision to terminate him based on the damage that was done. Mowbray also testified that he made no inquiries as to what orders Zermeno had received regarding irrigating that field, how long Zermeno had worked for Respondent, whether he had received any prior warnings for this same offense,[13] or whether he had been a good worker.

It was Mowbray's view that this serious a wash-out would not have occurred had the irrigator been dutiful to his job. When asked whether or not the incident could have occurred because of a gopher, Mowbray testified that it would be possible for smaller types of wash-outs, but not for one this extensive.

In describing the damage in Zermeno's field, Mowbray testified that a serious wash-out had occurred on the lower end of Field 14, which subsequently washed out a part of the end of the field, back of the road, and put sediment into the ditch in the lower adjacent field, Field 18. As a result, Mowbray testified he had to contact Merrill Ditch Liners to bring in levelers (or earth movers) to dig the sediment out of the cement ditch on Field 18, to haul the soil back in (estimated at half an acre), and fill up the

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11. According to Mowbray, "washing out" meant the water had eroded and washed the soil away until a large cavern was created.

12. Mowbray testified that the soil conditions around Fields 14 and 18 were medium to coarse texture and that alfalfa was grown.

13. Mowbray testified that there was no system for the giving of written warnings but that verbal warnings were given prior to discharge because he usually did not terminate employees for a single offense unless special circumstances warranted it. As examples of termination without verbal warnings, he mentioned extreme negligence, drunkenness, and stealing. He further testified that it was he who made the decision on terminations.

road and the end of the field.[14] Mowbray claimed that cleaning this sediment out of the ditch was necessary because otherwise it would be impossible to get water into the ditch to irrigate the crop. Mowbray also testified that some production acreage was lost, that it was not a large acreage but that the field was not large either.

Mowbray further testified that tractor foreman Silva, who generally took care of damage like this with Respondent's own grader, could not operate the grader through that big an opening because the hole was too wide and too deep and too much soil had been washed away.

Mowbray also testified that the evening before the incident, around 5:00 - 5:30 p.m., he had noticed that the border[15] was exceptionally full of water -- it was very high and almost at road level -- and as a precaution, he called Cardenas and specifically told him to warn the irrigators about this possible problem, the idea being to perhaps shut off the borders a little sooner so as not to stack so much water.[16]

Frank Silva also testified for Respondent. He testified that he tried to repair the damage in Field 14 with Respondent's own equipment -- a motor grader -- but was unable to do so.

3. The Repairs

Ken Bishop, sales engineer at Merrill Ditch-Liners Inc., testified that the field ticket made out by his crew foreman indicated that his company repaired a tail ditch wash-out on either March 5 or March 6, 1980, at a cost of $412.50. (Resp's Ex. 26[17] and 26A.) According to Bishop, this represented cleaning a concrete ditch, filling in a wash-out, and required five hours of work.

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14. Mowbray also testified that there was some minor repair on the ditch itself but Respondent's own workers were able to do that.

15. Mowbray described the border as an area of two ridges, in between which there was a flat area.

16. Cardenas could not recall receiving such a call from Mowbray.

17. The first page of Resp's Ex. 26 bears the date of February 29, 1980, but Bishop testified that people working in the office had put an incorrect date on the invoice and that it was the field ticket (p. 3 of the exhibit) that governed the date of when the work was actually performed. In any event, the fact that this exhibit represents the Zermeno damage does not seem to be in dispute.

4. The Gophers

Robert Hagemann, a farm advisor in agronomy and publisher of a number of aritcles on gopher control, was called as a witness by the General Counsel. Hagemann testified that there was a definite gopher problem in the Imperial Valley and that gothers could do a tremendous amount of damage, including large wash-outs. For example, Hagemann testified that were a gopher to bore a hole in an area where there were already a series of other passageways that went all the way through to another side of the road or field, the water could pass through these holes and eventually cause a major wash-out. Although gophers appear in all types of soil, the damage would be greater, according to Hagemann, in sandy soil.

Hagemann also testified that gophers like the roots of alfalfa particularly such as Field 14.

Finally, it was Hagemann's opinion that although a cement wall was one of the best ways to keep out gophers, gophers would still be able to get through it because they could either go over the top or under the bottom.

Mowbray also admitted that the Fillaree Ranch had gophers, that it was a problem, and that gophers could cause irrigation damage, but only if water got to the gopher hole at about the same time the gopher was there. (Mowbray described it as a gopher being at the wrong place at the wrong time). Mowbray also testified that in his opinion gophers could cause a bank to fall and a dirt ditch to break but very rarely would they cause a cement ditch to break because gophers would not be able to penetrate the concrete. But he acknowledged that gophers could cause a wash-out, if the terrain was not properly cared for, and that gophers were more of a problem in sandy or coarse soil because it was easier for them to dig there. Mowbray also testified that gophers were more active during the summer months than at other times and that the gopher problem at the Fillaree Ranch was severest in the northwest part, particularly Fields 2, 3, and 4, although he acknowledged that they were also present in other fields, including Fields 14, 18, 5 and 7.

On those occasions when there was gopher damage, Mowbray testified it had normally been repaired by Respondent's own personnel (shovelers, irrigators) or equipment (motor graders), that this was a part of the normal operation of the business, and that it was nothing to get concerned about. However, a situation when Respondent had to contact Merrill Ditch Liners, Inc. was different and constituted a major problem. According to Mowbray, since he had been working at Norton, the Zermeno and Jimenez/Arias incidents, infra, were the worst two sitatuions he had ever encountered and were the only times that Merrill Ditch had to be called in to make repairs caused by wash-outs.

Silva testified that he could fill up "little bitty" holes (caused sometimes by gophers) with the motor grader but that he couldn't handle the big wash-outs because he could not fill the hole

up compeltely in that he was unable to get the grader's tires (they lost traction) and blade (it got stuck in the ground) to function inside a large area. According to Silva, in a situation such as this, the only equipment that could help was a land leveller.

Silva also testified that gophers were a big problem, especially in sandy soil, and that though he had never seen a bank washed out, he had observed some gopher damage. Then, in a suprising statement, Silva testified that it was indeed a gopher that caused the Zermeno damage and that this was one of the few instances were Merrill Ditch Liners was required to repair gopher damage.[18]

Despite such testimony, it was Cardenas' view that gophers were not really a problem in the Imperial Valley; yet, he confirmed that he had sometimes assigned workers the specific task of trapping gophers though he also testified that there were fewer gophers in Field 14 than in other fields.

Cardenas also testified that all the ditches at Respondent's were made of cement and that gopher teeth were not strong enough to cut through. Although he admitted that gophers could go under the ditch, it was his opinion that they would be unable to break through since there would not be any water there at the point of breakthrough.

5. The Gopher Maintenance Program

Mowbray testified that since he commenced working at Respondent's -- around September of 1979, he had initiated a mechanical trapping program to catch gophers. There were two facets. First, shovelers and irrigators were informed that traps were available to them if they wanted to use them. The traps were kept at the shop, and several irrigators carried them in their vehicles and used them as part of their operation as they irrigated the fields. These employees would set the traps and then checked them from time to time as they would normally check their water.[19] Second, since sometime in the late winter or early spring, 1980, Mowbray initiated[20] a program whereby employees might be specifically assigned the task of setting gopher traps.

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18. On redirect examination by Respondent, Silva attempted to alter his testimony by stating he had made a mistake and that: "It wasn't no gopher. It was the negligence of the irrigators." (TR. 8, p. 107.)

19. It is unclear whether the program was initiated before or after the Zermeno wash-out.

20. Mowbray was uncertain as to what kind of a program was in effect prior to his arrival.

Ignacio Chaparro, an employee since 1977, testified on behalf of the General Counsel that Respondent's gopher maintenance program had not been continuous, had especially been intermittent under Mowbray, and that only after damage occurred on some of the fields, would anyone be assigned to trap gophers. Chaparro testified that he was assinged specifically to kill gophers with traps in December of 1980 and that another employee did it two months prior to that. Chaparro could not remember whether anybody was assigned to trap gophers in March of 1980, the time of Zermeno's discharge.

6. The Imperial Irrigation District

Mowbray testified that Respondent received water from the Imperial Irrigation District (hereinafter "District"). The water was released from the District through a series of canals; the delivery on the Fillaree Ranch was through the Fillaree canal, and specifically, through Fillaree Gate 13 whereupon it passed through a private pumping system. The Fillaree canal was regulated by the District.

Mowbray further testified that once the water came out of the Fillaree Canal, it was no longer the responsibility of the District as the District's responsibility terminated at the opening and closing of the canal gates. Now the responsibility for applying the water to the designated field was that of the landowner, and the only responsibility that the District had at this point was to see that there was not an excessive waste of water. Mowbray testified that Respondent had a system whereby it controlled the water once it took over responsibility for it; and if all the water were not used in the field, there is a waste box or a drop-box tail water[21] return system that returned it to a private canal that was owned by Respondent. The water was ultimately returned to the District.

In the case of Field 14, Mowbray testified that its water did not return to the District drain; it returned to a private drain. In other words, the tail water on Field No. 14 actually returned to a private irrigation delivery canal and the water was then reused in another part of the ranch.

Ronald Rodriguez, Assistant Superintendent in charge of water deliveries for the District, testified that in order to avoid wasting water by allowing irrigated water to spill out into the drain, a violation of the District's Regulations, (G.C. Exs. 11 and 18), many companies attempted to collect or "pond" the water in a waste box at the end of the field which cornered the excessive water. However, this too -- blocking off the passage of water from the waste box to the District's drain -- could also be a violation of the Regulations if done to excess. The problem was that if

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21. "Tail water" is excess water that is not readily used by the field after irrigation.

blocked, the water would burst eventually; and this result would be either damage to the District drain or to an adjacent water user.[22] However, Rodriguez testified that no such violation would occur if there were a private return system; in such a case, it was not unlawful for a landowner to pond his own fields.

7. The Termination Notice

According to Mowbray, upon discharge, the foreman was required to file a termination report; and the employee was supposed to sign it. Mowbray testified that it was his policy to provide written documentation as to the reasons for every termination and that he had instructed foremen Cardenas and Silva to comply with this policy and to explain the reasons for discharging any employee. Looking at Zermeno's personnel file, Mowbray testified that although Cardenas appeared to have written to Zermeno stating the reasons for his termination, it was not clear that Zermeno actually received it. (Jt. Ex. 1.) In any event, the purpose of the form, according to Mowbray, was not to benefit the employee but was so that he (Mowbray) would know the reasons for the discharge and so that copies could be attached to the termination slips. Mowbray testified that for that reason, it was not necessary that a copy go to the employee, only the file. In fact, Mowbray testified that though he had instructed foremen to verbally inform the employee as to the reasons for the discharge, he did not think the employee ever received a copy of the written explanation.

Cardenas testified that when a person was terminated, he was asked to read and sign a form, but was not given a copy of it. In Zermeno's case, at first Cardenas could not recall whether Zermeno refused to sign this form, but he did remember that he gave it to Zermeno, told him to read it, and sign it if he wanted. Later Cardenas testified that Zermeno did refuse to sign it. As to the written explanation for the discharge (Jt. Ex. 1, p. 4), Cardenas testified that he did not show this to Zermeno (even though it states "to Juan Zermeno") but that his boss, Mowbray, had asked him to fill it out; and he did so subsequent to the termination.

22. According to Rodriguez, excessive ponding could cause a wash-out.

Zermeno testified that he never saw a termination form himself, that Cardenas never asked him to sign any paper, and that he had never received any form through the mail relating to his termination.

8. Inclusion of Unfair Labor Practice Charges in Personnel File

Mowbray testified that whenever he received an unfair labor practice charge, he would try to see to it that Respondent's home office in Phoenix, Arizona, as well as his local attornys at Western Growers Association, received copies. In addition, Mowbray testified that he himself maintained a personal personnel file on employees and that as part of each employee's file, he would keep, inter alia, any unfair labor practice charges filed by that employee. More specifically, Mowbray's files contained a copy of an unfair labor practice charge filed by Zermeno (Jt. Ex. 1, p. 6), and the same was true for Jimenez and Espinoza, infra. When asked why, Mowbray replied, " . . . because I'm probably going to have to be here like I am today, and it doesn't seem uncommon to me to read what I'm being charged with" (TR. 2, p. 37). Mowbray further testified that he kept everything in the personnel file that remotely pertained to personnel so that it would only be natural that an unfair labor practice charge would go into that file along with everything else.

Finally, Mowbray testified that he tried not to tell his foremen of the filing of any unfair labor practice charges.

B. Analysis and Conclusion

The Respondent is charged with having violated sections 1153(c) and (a) of the Act by discharging Juan Zermeno and Atilano Jimenez, infra. Section 1153(c) makes it an unfair labor practice to discrimate "in regard to hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Under Section 1153(a), it is an unfair labor practice for an agricultural employer to "interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152" of the Act. The Section 1153(a) violations alleged in the Complaint are derivative; that is to say that the violation necessarily follows from a finding of a Section 1153(c) violation. See Maggio-Tostado, Inc., 3 ALRB No. 33 (1977); Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977), enf'd, 24 Cal. 3d 335 (1979).

Of course, rarely is there direct evidence that action was taken against an employee because of the employee's protected conduct. Unlawful motivation may be inferred from evidence showing that the employer was hostile to the protected activity and knew that the employee was engaged in it. Knowledge of an employee's protected activity may itself be inferred from circumstantial evidence.

1. Legal Principles in Dual Motive Cases

For years the NLRB and the federal courts of appeal were perplexed by the difficulty in determining the correct standard to be used in "dual-motive" cases, such is present in the instant cases, where discharges were effectuated for both legitimate business reasons and because of the employee's protected concerted or Union activities. Even if an employer were motivated by unlawful factors, should he not still be able to demonstrate that his contested action would have occured anyway even if the unlawful motive were not present?

In order to resolve this dilemma, the NLRB embraced the test set forth in the U.S. Supreme Court cases (involving constitutional law) of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). In Wright Line, 251 NLRB 150, 105 LRRM 1169 (1980), the NLRB adopted a new standard in dual motive cases:[23] "First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once that is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 105 LRRM at pp. 1174-1175. If the employer fails to carry his burden in this regard, the Board is entitled to find that the discharge was improper.

The Board made it clear that it hoped by this decision to end the uncertainty of the weighing of competitive motives: "In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry the burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employee's protected activities are causally related to the employer action which is the basis of the complaint."

By this standard, the union activist who is guilty of misconduct can still be disciplined; yet, the employer has the burden of showing that said employee would have been disciplined anyway, regardless of his union activity.

The California Supreme Court has approved of the Wright-Line standard and applied it to ALRB proceedings where a dual-motive is in issue. Martori Brothers Distributors v. Agricultural Labor Relations Board, 29 Cal. 3d 721, 175 Cal.Rptr.

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23. In Wright Line, Inc., the NLRB distinguished a dual motive case from a pretext case: the latter is one in which the employer's affirmative defense is "wholly without merit," whereas in the former, the affirmative defense has "at least some merit." Wright Line, Inc., supra, 105 LRRM at 1170, n. 5.

626 (1981). The Court reasoned that Wright-Line was essentially a "but for" test that had been approved by some appellate courts; e.g., Royal Packing Co. v. Agricultural Labor Relations Board, 101 Cal.App. 3d 826, 834-835; Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board, 93 Cal.App. 3d 929, 935; Abatti Farms, 107 Cal.App. 3d 317 (1980) and stood for the proposition that where an employee was discharged for both legitimate business reasons and illegitimate reasons, the question should be whether the discharge would have occurred "but for" the protected concerted or union activity. The Supreme Court in approving this test held: "When it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained 'but for' his union membership or his performance of other protected activities."

Interestingly, at the same time the California Supreme Court was adopting the "but for" analysis of Wright-Line, so too was the Agricultural Labor Relations Board in Nishi Greenhouse, 7 ALRB No. 18 (1981): ". . . if the General Counsel establishes that protected activity was a motivating factor in the employer's decision, the burden then shifts to the employer to prove that it would have reached the same decision absent the protected activity."

This test is said to achieve the goal of "weighing" the interests of employees in concerted activity against the interests of the employer in operating its business in a particular manner. The employee is protected, since he or she is only required to show initially that protected activities played a part in the employer's decision, and the employer is provided with a formal framework in which to establish its asserted legitimate justification.

Applying the standards set down in the decisions to the facts of the Zermeno matter, I have grave doubts that the General Counsel has carried her burden of proof and made a prima facie showing that protected conduct was a motivating factor in the discharge decision. In order to establish such a prima facie case of discriminatory discharge (or discriminatory refusal or failure to rehire), the General Counsel must demonstrate by a preponderance of the evidence that "the employee was engaged in protected activity; that Respondent had knowledge of such activity; and that there was some conection or causal relationship between the protected activity and the discharge or failure to rehire". Verde Produce Company, 7 ALRB No. 17 (1981). Here, the General Counsel failed to show the necessary nexus between union activity and discharge. Jackson and Perkins Rose Co., 5 ALRB No. 20 (1979). The General Counsel would have me decide that Respondent discriminatorily discharged Zermeno on the basis of his attendance at two negotiating sessions prior to his discharge (February 6 and February 27, 1980), and his presentation of the petition (G.C. Ex. 3) to Mowbray[24] in December of 1979 or January of 1980, two to three months prior to his

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24. Mowbray denied receiving the petition from Zermeno.

discharge.[25] General Counsel overlooks the fact that Zermeno testified that he had been an active UFW supporter for a long period, passed out leaflets in September, 1979 and buttons in October, 1979, and that he was observed by several foremen. Yet, there is no evidence of any action being taken against Zermeno prior to his involvement in an incident in which Respondent sustained damage to its property and the possibility of irrigator negligence was present. A conclusion or an inference that the discharge of an employee would not have occured but for his union activity or protected concerted activity must be based upon evidence, direct or circumstantial, not upon mere suspicion. N.L.R.B. v. South Rambler Co., 324 F.2d 447 (8th Cir. 1963). Evidence which does no more than create suspicion or give rise to inconsistent inferences is not sufficient. Schwob Mfg. Co. v. N.L.R.B., 297 F.2d 864 (5th Cir. 1962); Rod McLellan, 3 ALRB No. 71 (1977). Mere suspicion of unlawful motive is not substantial evidence; an unlawful or discriminatory discharge purpose is not to be lightly inferred. Florida Steel Corp. v. N.L.R.B., 587 F.2d 735 (5th Cir. 1979); Lu-Ette Farms, Inc., 3 ALRB No. 38 (1977).

Ordinarily, a finding that the General Counsel has not established a prima facie case of discriminatory discharge means that it is not necessary to consider Respondent's proferred business justification. However, even assuming arguendo that a prima facie case was made, I find that the discharge would have occurred anyway.

General Counsel contends that "the wash-out was caused by a gopher and not by Zermeno's carelessness." (G.C.'s posthearing Brief, p. 33.) But the General Counsel misses the point. This is not a labor arbitration in which just cause is the issue. The employer's motivation is the controlling factor. Absent a causal relationship between the union activity and the discharge, Respondent can be completely mistaken about Zermeno's culpability for the incident, but the discharge will stand. Mueller Brass Co. v. N.L.R.B., 581 F.2d 363, 368 (3rd Cir. 1978). In this case, I believe Mowbray honestly felt that the amount of damage present justified discharge for whomever was working in this field.[26] Where the Board could as reasonably infer a proper motive as an unlawful one, the act of management cannot be found to be unlawful discrimination. N.L.R.B. v. Huber & Huber Motor Express, 223 F.2d 748 (5th Cir. 1955). Thus, seemingly arbitrary discharges, even if harsh and unreasonable, are not unlawful unless motivated by a desire to discourage protected union activity. N.L.R.B. v. Federal Pacific Electric Co., 441 F.2d 765 (5th Cir. 1971). The Act does

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25. Zermeno also testified that he and Jimenez helped gather signatures for the petition, but there is insufficient evidence that Zermeno was observed by company personnel.

26. The extent of damage is amply displayed in those photographs that all parties agree accurately depicts the scene. (Resp's Exs. 3 and 4.)

not insulate a pro-union employee from discharge or layoff. It is only when an employee's union activity or concerted activity is the basis for the discharge that the Act is violated. Florida Steele Corp. v. N.L.R.B., supra. "In the absence of a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." Borin Packing Co., Inc., 208 NLRB 280 (1974); Lu-Ette Farms, Inc., supra; Hansen Farms, 3 ALRB No. 43 (1977). See also, Mueller Brass Co. v. N.L.R.B., supra; Edgewood Nursing Center, Inc. v. N.L.R.B., 581 F.2d 363, 368 (3d Cir. 1978). The purpose of labor legislation is not to vest the Board any control over an employer's business practices so long as union discrimination is not present. Martori Brothers Distributors, supra, citing N.L.R.B. v. Lowell Sun Publishing Co., 320 F. 2d 835, 842 (1st Cir. 1963).)

From this standpoint, even if Cardenas was covering up for his own negligence and placing the blame on Zermeno, as some of the evidence suggests, I can find no violation under the Act because I don't see it connected with Zermeno's Union activities.

Moreover, I am not convinced that Zermeno bore no responsibility for the incident, and I am not impressed with his total denial of any blame. He did not question Cardenas' order or suggest a possible danger. And Zermeno admitted that his first reaction upon seeing Cardenas was to inquire if he were going to be fired so at least the possibility existed in his own mind that he may have been at fault in some way.

Furthermore, Zermeno gave slightly different versions of what caused the wash-out. When asked by the General Counsel why he was fired, he answered: "because a gopher made a break through." (TR. 3, p. 75.) When asked by the ALO what was incorrect about the orders Cardenas gave him, Zermeno said that he should never have been ordered to place any water stops. However, Martinez testified that Zermeno blamed the incident on Cardenas for requiring him to place water checks too high.

But the General Counsel argues further that others, particularly Antonio Villegas, were involved in incidents of wash-outs and yet were not discharged. However, the General Counsel does not discuss either the severity, in terms of damage, of these other occurrences, whether Merrill Ditch had to be called in, or whether the incident was the result of irrigator negligence, in whole or in part, or some other factor. Because Villegas (or others) were not terminated for being involved in wash-outs does not address the issue of whether Zermeno (or Jimenez) was treated differently as a result of Union activities. (Villegas also signed the petition.) Only by comparing similar damages resulting from arguable irrigator negligence could a relevant statement be made concerning any inconsistency in discipline.[27]

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27. In this regard, it is at least worth noting that many of the "prior" incidents cited by General counsel occurred after and not before the Zermeno (and Jimenez) event.

None of the Villegas incidents appears to be as serious as Zermeno's (or Jimenez', infra). Although limited flooding occurred in some of them, the damage was such that Respondent's own equipment could do the repair work and Merrill Ditch did not need to be called. (Incident in 1979 involving Villegas and Arias; another incident involving Villegas and Arias in March of 1980; incident of March 18, 1980, involving Villegas; incident of August, 1980 involving Villegas; incident of October, 1980 involving Villegas.) In addition, Zermeno testified about an incident in Field 18 in 1979 or 1980 involving Villegas but admitted it was minor damage fixed with Respondent's own equipment. Zermeno also testified that Jesus Ramirez caused a cave-in in the fall of 1979 which was worse than his damage, but Zermeno testified he never saw the damage. Ramirez did not testify. (Ramirez also signed the petition.)

As to other incidents referred to in the testimony, (1979, involving Eliseo Martinez; December, 1980 involving a "Roberto"), they like so many others that were mentioned by various witnesses, lacked sufficient description or evidentiary basis for a trier of fact to conclude that they were comparable to the Zermeno (and Jimenez) damage or that they were the result of irrigator negligence.

Similarly, General Counsel argues that two Merrill Ditch invoices (post-Zermeno)[28] indicate greater damage than that done by Zermeno. (Resp's 29, June 25, 1980; Resp's 30, August 29, 1980.) But the General Counsel has not adequately shown how these incidents occurred or whether any negligence on the part of the irrigator was involved. (The June incident most likely is what Cardenas testified about when he indicated that in June of 1980 in Field 27 the fertilizer tanks had become heavy, got very close to the edge of the cement canal, and broke about three sections fourteen feet in length by pushing them inward. Cardenas testified this was not the negligence of any irrigator.)

Finally, it should be mentioned that Zermeno was involved in a previous incident in January of 1980 when water from underneath broke through a part of a canal which was sitting on loose dirt. Cardenas testified that no disciplinary action was taken because it was not Zermeno's fault; the canal was in bad condition. General Counsel argues that this helps prove that the real reason for Zermeno's discharge in March was his Union activity, pointing to his

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28. The only Merrill Ditch document in evidence which predates the Zermeno incident is Resp's 25. But though this involved a substantial sum of money ($3,497.00), the evidence is that this was not a wash-out and did not involve any possible negligence. Cardenas, whom I credit here, testified that a canal had had loose dirt around it and was breaking up and that water went underneath the canal, thereby causing the damage.

having given the petition to Mowbray during the same month 29/ and having attended negotiating sessions in February and March.

On the other hand, it could just as cogently be arged in Respondent's behalf that on those occasions when an employee is clearly innocent of any fault, Respondent does not take any action; and it is ony when an irrigator is arguably negligent that discipline is meted out.

General Counsel also argues that Cardenas' order directing Zermeno to place borders in a drainage ditch caused excessive "ponding" which not only constituted a violation of the Imperial Irrigation District Reglations No. 17(G.C. Exs. 11 and 18), but also in and of itself was the cause of the wash-out.

Respondent, in contrast, argues that excessive ponding did not occur because the water returned through a private return system and was therefore, not a violation of the Regulation.

I find it unnecessary to resolve the question of whether Cardenas' order caused Zermeno to violate the District's Regulation or whether the order demonstrated a neglect of duty on his part. Such issues, though perhaps pertinent in an arbitration to establish just cause for discharge, are irrelevant to an unfair labor practice allegation of discrimination where the central question is whether the termination was motivated in whole or in part by anti-union animus. The violation of the District's Regulation would only become relevant had there been evidence that Cardenas deliberately attempted to find a reason for the discharge by placing Zermeno in an untenable position by the issuance of a known unlawful order which would inevitably result in a major wash-out, thus necessitating a termination. I do not find that there was any credible evidence that this was Cardenas' intent.

Finally, there are some other contentions made by General Counsel that need to be addressed. To begin with, General Counsel argues in her post-hearing Brief (at p. 38) that Zermeno's discharge was handled in a curious fashion because Cardenas wrote an elaborate explanation of Zermeno's firing which Zermeno never saw before it was written, despite the fact that it was addressed to him. It seems to me that Respondent has shown that the explanation was written for file purposes only. Respondent had no company rule requiring it to present to the employee written reasons for the discharge. Furthermore, in view of this lack of such rule, it matters little whether Zermeno signed the form, refused to sign it,

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29. It is unclear from the record whether this incident occurred before or after Zermeno allegedly gave a copy of the petition to Mowbray.

or was even shown it.[30/] Finally, the fact that the reasons set forth in writing for Zermeno's termination were different from and more expansive and elaborate that Jimenez', infra, (Jt. Ex. 2) is not of great consequence.

General Counsel likewise finds it odd that Mowbray took photographs of the Zermeno wash-out and turned them over to Western Growers Assocation attorneys. It do not agree. The mere fact that Respondent may have anticipated an unfair labor practice charge being filed (and thus perhaps signalling that it had knowledge of Zermeno's protected activities) does not take away from the fact that an incident occurred and was severe in nature. Had there been no photographs, Respondent would have had less evidence to support the thrust of its claim that extreme disciplinary action was required in response to a major wash-out. In fact, the lack of photographic evidence may have given General Counsel cause to argue that what occurred was more of a routine incident.

I also find no untoward inferences to be drawn from the fact that Mowbray kept Zermeno's one unfair labor practice charge, filed, naturally, after his discharge, in his personal file. The originals were maintained at Respondent's main office in Phoenix and Mowbray's file did not contain any information not available at the Phoenix office. I fail to see how Zermeno's charge, placed randomly in Mowbray's file, is evidence of discriminatory intent. Obviously, an unfair labor practice charge would be maintained somewhere at Respondent's operation, and Mowbray, should he have wanted to, could have gained access to it. Whether it was in his personnel file or in some other location does not seem to me to carry much evidentiary weight.

For all the foregoing reasons, I find that General Counsel did not establish a prima facie case; but assuming arguendo she did, I further find that Respondent sustained its burden and that regardless of Zermeno's Union sentiments, for good reason or bad reason, he would have been terminated anyway. I recommend the dismissal of this allegation.

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30. No claim is made that Zermeno was not aware generally of the reasons for his discharge or that he was not verbally informed of the action Respondent was taking against him.

C. Atilano Jimenez

1. Interrogation about his Union Activities and the Filing of an ALRB Charge; Directing him to Perform More Difficult Work because of such Activity.

a. Facts

Jimenez testified that on March 5, 1980, the day after Zermeno's discharge, he personally took Zermeno's unfair labor practice charge to Cardenas 31/ and that Cardenas asked him why it was he who was presenting the document on behalf of Zermeno, to which Jimenez said he replied that he was representing the workers and was a member of the Negotiating Committee. According to Jimenez, Cardenas stated: "I did not know that you belonged to the Union." (TR. 5, p. 12.)

Jimenez testified that Cardenas treated him differently thereafter and that, for example, that very day he was given harder work when Cardenas sent him to irrigate Field No. 26, a field of cotton consisting of ninety acres and, according to Jimenez, a field that was usually irrigated by two persons especially on the first irrigation, which was the case here. Jimenez testified that it would be quite unusual to irrigate only a part of that field and that it was always irrigated completely at one time. Jimenez, through the use of General Counsel Exhibits 17 and 20 32/ testified that in order to get foot high water from squares (plots of land adjacent to the field) onto the field, pipes, called "siphons", would have to be utilized. Each square would have a lid or cover, and this cover would be lifted to regulate the water that went into the square. Normally, one irrigator would start the pipes, get them filled with water, and place them inside the row while the other would stay behind to see that the water in the squares remained at the proper level, that the pipes had not stopped flowing, or that a square had not broken. As many as 350 siphons would be used. Jimenez further testified that this task was expecially arduous on the first irrigation because the dirt was loose; and consequently, the squares could break easily. Working alone, Jimenez had to start the siphons going for the first few squares and then come back to regulate them. According to Jimenez, squares were constantly

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31. The proof of service of the charge contains a declaration by Jimenez that he personally delivered a copy of the charge to Cardenas. (G.C. Ex. 1(h).)

32. G.C. Ex. 20 was an actual irrigator's pipe which was similar to the type Jimenez testified was used in Field 26 on March 5. Because of its size and weight, it was decided that the pipe would be turned over to the custody of Jose Carlos, Board agent in the El Centro ALRB office, and that General Counsel would substitute in its place a photograph of the pipe to be admitted as G.C. Ex. 20A. The General Counsel failed to provide a photo; however, the pipe is described on the record. (TR. 5, p. 21.)

filling up with too much water, and he had a very difficult time controlling them.

Jimenez further testified that because he felt that there was too much work for him to do alone on this one field, he immediately filed an unfair labor charge against Cardenas and handed it to him the following day. (G.C. Ex. 1(i).) According to Jimenez, Cardenas angrily approached him, sarcastically asked him if he were planning on filing charges every day, and then defended himself against the allegation by pointing out that Jimenez had neglected to ask for any help. Jimenez also testified that he replied that it would not have done any good since Cardenas would still mistreat the employees to which Cardenas is alleged to have responded: "From now on we shall see. It is going to be different with you." (TR. 5, p. 25.)

As an adverse witness called by the General Counsel, Cardenas acknowledged that Jimenez had handed him Zermeno's unfair labor practice charge one day after Zermeno's discharge, but testified he did not recall what it said and did not ask Jimenez any questions about it. About two weeks later on direct examinination, Cardenas, now a witness for Respondent, testified that the only way he received the Zermeno charge was through the mail; still later in his testimony, while still on direct, he returned to the original version that he had indeed received the documents from Jimenez but added that he told Jimenez he had already received papers in the mail. Cardenas testified that this was the extent of their conversation.

As regards Jimenez' own charge regarding Field 26, Cardenas did not specifically deny that he became angry, made a sarcastic comment and threatened to treat Jimenez differently. Instead, he testified that he only told Jimenez he had already received similar papers.

Cardenas, admitted that Field 26 was a difficult field to irrigate, especially when the field was young, and that at least two irrigators would be required for a first irrigation; but he denied he ordered Jimenez to do it alone. Cardenas acknowledged that in March of 1980 he ordered Jimenez to irrigate Field 26 but only one third of it.

Cardenas testified that it was not possible to irrigate Field 26 all at one time because there was no way to pump enough water into the field to sufficiently cover the entire area. Cardenas further testified that Field 26 had a pump and that the water capacity was 12 feet, that he always started with 6 feet, but that with 6 feet one couldn't even cover one third of the field. In other words, Cardenas contended that it was not even possible to irrigate thirty acres at one time if one wanted.

Cardenas disagreed with Jimenez' description of the necessity to use the siphon (G.C. Ex. 20) in order to irrigate Field 26. Cardenas testified that his method would be to turn on the

pump, the water would go into the field through a 12 inch cement pipe into a dirt canal, and then would be funnelled through a smaller 1½ inch pipe (which was buried in the dirt canal) into each row. Cardenas also testifed that the amount of water going into the large pipe and into each row could be regulated by the irrigator thropump, the water would go into the field through a 12 inch cement pipe into a dirt canal, and then would be funnelled through a smaller 1½ inch pipe (which is buried in the dirt canal) into each row. Cardenas also testifed that the amount of water going into the large pipe and into each row could be regulated by the irrigator through the use of small boards.

Cardenas further testified that the siphons would never be used at the start of the irrigation because too much water would form, would travel to the road, and would create a small brook; it would only be used 24 hours after the start of this irrigation process. In addition, Cardenas pointed out that the siphon would only be used to free up water when water was not running evenly; e.g., when debris had accumulated in the small pipes. In this case, according to Cardenas, the irrigator would use the siphon to hurry the water through the rows that were left behind, meaning the row that did not receive water. By pumping on the siphon, water would come out of the dirt canal into the row.

Mowbray testified that Field 26 probably would be getting prepared for cotton planting in March. ". . . The cotton may not even have been planted. It would depend on exact dates, but it would be seeded at that time." (TR. 2, p. 97.)

As a rebuttal witness for the General Counsel, Zermeno testified that he visited Field 26 on March 5, 1980, 33/ when Jimenez was there and observed that cotton seed irrigation was being performed and that the siphon system of irrigation was being utilized. Though he acknowledged, as Cardenas had testified, that there were fields at Respondent's where small pipes were buried in the dirt which transported the water into the field, he denied that such a system was in use on Field 26 on this occasion. In fact, Zemeno testified there were no pipes at all underneath the ground on this field. On cross-examination, he admitted that he had never irrigated Field 26 but he testified he had done the first irrigation on a cotton field (Field 22) and the siphon pipe system was used.

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33. Zermeno testified he had gone to the field in search of Jimenez in order to line him up as a possible witness in his discharge case.

D. Analysis and Conclusion

1. Unlawful interrogation and threat regarding Jimenez' Union activities and the filing of ALRB charge.

In the present case, we have three alleged remarks Cardenas made to Jimenez that General Counsel argues were violations of Sections 1153(a), (c), and (d) of the Act: (1) Cardenas' statement upon receipt of the Zermeno unfair labor practice of, "I did not know that you belonged to the Union"; (2) his sarcastic question upon receipt of Jimenez' own charge as to whether Jimenez intended to file charges daily; and (3) his further statement of, "From now on we shall see. It is going to be different with you."

I find that Cardenas made the three remarks attributed to him. Jimenez is to be believed over Cardenas. The inconsistency in Cardenas' testimony over how he received the Zermeno charge has been pointed out above. In addition, Cardenas' testimony was vague and lacking in candor; he often found it difficult to give simple answers to simple questions. In contrast, Jimenez was direct in his answers and his demeanor gave the appearance of trustworthiness. I credit his testimony.

The statement upon receipt of the Zermeno charge.

I find that Jimenez physically delivered to Cardenas Zermeno's unfair labor practice charge. However, Cardenas' remark to Jimenez that he didn't know he (Jimenez) was a member of the Union, does not imply a threat or does not constitute interrogation. Rather, it illustrates knowledge on the part of Cardenas that Jimenez was indeed an active Union supporter.

The sarcastic remark regarding the daily filing of charges.

Although this remark was apparently made in a sarcastic vein, there is nothing in the record to suggest Cardenas was anything but serious when he said it. In fact, he was in an angry state of mind when it was uttered. 34/ Sarcastically criticizing the filing of a charge is no different from threatening or questioning an employee about it. The intended effect is the same -- restraining the employee from filing charges in the future. (Ramos Iron Works, Inc. (1978) 234 NLRB 896. Coming from a man like Cardenas (who is also physically imposing in size and weight) such a remark might very well accomplish its intended goal.

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34. Cardenas acknowledged that his manner of speaking to those whom he supervised was always harsh and that he often used vulgar words.

The statement, "It is going to be different with you."

This last remark was clearly a threat of discriminatory treatment directed at Jimenez as a result of Cardenas' anger over his filing his own unfair labor practice charge. Threatening an employee with dire future consequences for his exercise of protected rights is a violation of the Act. (Hemet Wholesale (1977) 3 ALRB No. 47, rev. den. by Ct.App., Fourth Dist., Div. 2, Sept. 14, 1977.)

2. Discrimination against Jimenez, as a result of the filing of ALRB charges.

Section 1153(d) of the Act makes it unlawful to "discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part." (Emphasis added.) This provision is identical (except for the use of the word "agricultural") to Section 8(a)(4) of the National Labor Relations Act, and it has been held that the NLRB's broad and liberal interpretation of this provision will be followed by the ALRB. Bacchus Farms (1978) 4 ALRB No. 26. Discharging or disciplining an employee for filing unfair labor practice charges is unlawful. (C. Mondavi & Sons d/b/a/ Charles Krug Winery (1979) 5 ALRB No. 53, rev. den. by Ct.App., First Dist., Div. 2, June 18, 1980; hg. den. July 16, 1980; N.L.R.B. v. Scrivener (AA Electric Co.) (1972) 405 U.S. 117, 31 L.Ed. 2d 79.)

Here we have an interesting problem, not discussed in the Briefs. If Jimenez was disciplined by his solo assignment to Field 26, it was not because of his filing an unfair labor practice charge -- Jimenez' charge was filed later, as a result of his assignment -- but because he handed someone else's charge -- Zermeno's -- to Cardenas. Presumably, Respondent would argue that Section 1153(d) would only contemplate acts of discrimination against the person actually filing the charge; and that since it was Zermeno's charge, there could not be discrimination against Jimenez.

I do not think it proper to read the statute so narrowly. Bacchus Farms, supra. When Jimenez handed Cardenas the charge (and also informed him that he was a member of the Negotiating Committee and representing the workers), he was actually participating directly in the "ULP" process so that his participation was the equivalent of an actual "filing", as required under Section 1153(d). 35/ Thus, the Act protects not only those who file charges to vindicate their individual rights, but those who, to an equal measure by their actions, likewise participate in the process on behalf of others.

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35. For this reason, I hereby deny Respondent's Motion to Dismiss, made at the close of General Counsel's case, upon which I had reserved a ruling.

In addition, it is equally true that changes in conditions of employment may consitute unfair labor practices if their purpose is to inhibit protected activity. (Arnaudo Bros., Inc. (1977) 3 ALRB No. 78, enf'd by Ct.App., Third Dist., May 16, 1978, hg. den., June 27, 1978; Hemet Wholesale, supra.)

For reasons previously stated, I have not given much credit to Cardenas' testimony. I do not credit it here either. I find that Jimenez was assigned a difficult cotton field's first irrigation alone, when such a task, by Cardenas' own admission, normally went to two irrigators. And I find that this was done the very same day Cardenas became aware that Jimenez was an active Union supporter, a member of the Negotiating Committee, and a Union representative who was presenting an unfair labor practice charge on behalf of Zermeno, whom Cardenas had fired the previous day.

In addition to Jimenez, whom I credit again, I was also impressed with Zermeno's honest demeanor as a rebuttal witness. In my opinion, he successfully rebutted much of the testimony of Cardenas.

While it is true that Jimenez did not actually complain to Cardenas about the assignment or ask for additional help, his reasons for refraining to do so were reasonable; and I accept them. Jimenez testified that he had complained about the work before, and it had been his experience that it was futile to do so because Cardenas only became upset and angry.

Jimenez also immediately filed a charge (on March 7, 1980) protesting the imposition of extra work because of his Union activities. But Respondent argues in her post-hearing brief that Jimenez was assigned to work Field 26 again (after he filed his charge) on March 8 and March 12 and that no charges were filed after these assignments. However, it is not clear from the record whether he was assigned the field alone on those days, whether he was told to irrigate the entire field, or whether -- it not being the first day of irrigation -- more than one irrigator was required.

In summary, the General Counsel has shown to my satisfaction that Jimenez filed with Cardenas a copy of an unfair labor practice charge on behalf of Zermeno, that Cardenas also learned thereby of Jimenez' Union support and activity, and that as a result of that knowledge, Cardenas assigned him extra work in Field 26.

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3. The Incident

Jimenez testified that he began working at Respondent's as an irrigator in August, 1978 and that he had twelve years experience in this field. On March 30, 1980, he started what turned out to be his last shift, irrigated Field 2, and changed the water to Field 5. According to Jiminez, at around 11:30-11:45 p.m., after he had changed some melgas, he noticed that they were going very slowly and contained little water. His initial reaction was that the electric pump had stopped; but he then noticed that there was very little water in the canal so he went to where another irrigator, Jose Arias, was irrigating (Field 14),36/ used his flashlight to look into the canal, and saw that it was broken. Jimenez testified he the stopped the pumps, returned to where Arias was, saw that he was sleeping in his car, and awoke him. Both men returned to the broken canal where Jimenez testified he observed that Arias had failed to properly lift up the metal "checks" which controlled the water width and that the water had dammed up, thereby causing the canal to break and to damage Field 14.

Jimenez further testified that at that point (2:00-2:30 a.m.) Arias called Cardenas at home and told him the canal had broken. Upon arriving at Field 14 (a little before 6:00 a.m.), Cardenas, according to Jimenez, approached Arias and reminded him that he had been previously warned to be careful with the checks because the day before he had made the same mistake. Jiminez testified that Arias admitted falling asleep and neglecting to lift the check and stated that it was his fault. Cardenas replied that he would have to check with Mowbray.

Thereafter, Cardenas went to the "shop", returned and announced that both men were being fired. Jimenez testified he asked why and was told it was on Mowbray's orders.

Jose Arias also testified for the General Counsel. According to Arias, Cardenas had ordered him that evening to irrigate Field 14 and start working toward Field 15 and that Jimenez was to start on Field 2 and work toward Field 5 until both of them met. Thus, Jimenez started on one end and he on the other. Arias testified that he and Jimenez were using the same water, meaning that the water that the pump were pumping was going along the same canal; and because Jimenez was not getting a sufficient amount from Arias' fields, Jimenez came to see what the problem was and awakened him around 1:00 a.m. (He had fallen asleep in his car alongside of the ditch were he had been working.) Together they went to investigate the electric pumps because they both thought they had shut off, only to discover that it was the canal that had broken.

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36. Jimenez testified that Field 14 was approximately one mile from Field 5.

Arias also testified that he spoke to Cardenas by phone around 2:00 a.m. and told him that a ditch had broken and for him to come and see it. Cardenas arrived at 3:30 a.m., and Arias testified he told him that he had fallen asleep.

Arias further testified that the wash-out was his fault and that Jimenez did not do anything wrong and should not have been fired. Arias explained that the wash-out occurred because he had closed the gates (or covers) that allowed the water to flow to the melgas and had failed to lift up the "check" on the canal which would have permitted the water to move forward. According to Arias, had he been awake, he would have either raised the check earlier or shut off the pumps.

Finally, Arias testified that Mowbray arrived (between 7:00 a.m. and 7:30 a.m.) but that Mowbray did not question him. Shortly thereafter, Cardenas informed him and Jimenez that they were terminated. Arias testified that at that time, in the presence of Jimenez, he told Cardenas that there was no reason for them to fire Jimenez because it had been his (Arias') fault.[37]

Mowbray was the main witness for Respondent. He testified that Cardenas called very early in the morning and told him of a serious wash-out on Field 14. Mowbray said he arrived at the ranch at 7:00 a.m. and observed the wash-out area. Mowbray testified he saw a great deal of damage -- the portion of the concrete ditch on the Northwest part of Field 14 was largely washed away, the base was completely undermined, and the water had flowed the complete length of Field 14 and even washed out the same general area again (on the tail end of Field 14) that Zermeno had. Mowbray testified there was also damage in fields besides 14 because the soil and water that flowed through the bank and tail end of Field 14 had travelled through the cement ditch in Field 18 and out into Field 18 itself, depositing material in the upper center of one of the borders.

When asked whether there was any particular problem arising from this incident that was different from others, Mowbray testified, "yes", that the main water supply through the concrete ditch that supplied several other fields north of Field 14 had been severed, that soil had to be hauled back to reconstruct the cement ditch, and that booster pumps had to be utilized for irigation of some fields.

Mowbray further testified that he made the decision to terminate both Arias and Jiminez on his own, although he consulted with Cardenas. Since there were two people involved working on the

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37. On February 4, 1981, in the middle of the direct testimony of Arias, the General Counsel attempted to amend the Complaint to include Arias as a discriminatee on the grounds that the evidence now showed that he was an indirect victim of the discrimination against Jimenez and that he was fired in order to cover up the unlawful Jimenez discharge. Respondent objected to the amendment, and I sustained the objection.

same ditch but geographically separated, Mowbray testified he had difficulty deciding who was individually responsible; and that he therefore made the decision to terminate both of them, rather than risk the possibility of terminating one and keeping the other and making the wrong choice in so doing. Thus, having seen the damage, Mowbray testified he decided to terminate whomever it was working in the vicinity at the time the wash-out occurred and so insturcted Cardenas that morning.

After Cardenas had followed this order, Jimenez entered Mowbray's office and insisted that it was not his fault,38/ but Mowbray testified he explained that he did not want to talk about it and added that he would not tolerate bad work. Mowbray admitted that he gave no consideration to either Jimenez' or Arias' work record or whether they had received any prior disciplinary action prior to his decision to discharge them.

On cross-examination Mowbray admitted that it was not all that unusual to have wash-outs in the month of March in Fields 14 and 18 because he often had smaller ones there when they watered the fields. But he added that those wash-outs were not of the magnitude of either Jimenez' (or Zermeno's) and that while other problems could possibly be a contributing factor to the wash-out, it was still the irrigators' job to properly apply and watch over the water and take corrective action early enough to avert any possible problem.

Jose Cardenas also testified about this incident. According to him, Jimenez was supposed to bring water from Field 2 to Field 9, and Arias was to bring water from Field 14 to Field 7; and both of them had the same head of water. (G.C. Ex. 9.)

Cardenas testified that since Arias and Jimenez were both irrigating out of the same canal, it was his view that each bore some responsibility to observe any possible damage the water could cause. (He added that had it been different canals, it would be a distinguishable situation.) Thus, according to Cardenas, Jimenez' fault was in failing to discover the absence of water, and checking with Arias as to what the problem was at an earlier time.39/

Initially, Cardenas admitted that Arias told him that it was his (Arias') fault and not Jimenez' for the damage done on Field No. 14; later, however, he denied that Arias had said it was his fault, only that he had indicated that he had forgotten to open the principal water gate. Cardenas testified he spoke to Arias around

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38. Mowbray added: "I had no way of knowing that at that point in time." (TR. 7, p. 119.)

39. According to Cardenas, the kind of damage in this incident would take from 5-7 hours to occur. Cardenas testified that he never bothered to find out why Jimenez had neglected to check on the water and had just assumed he had fallen asleep.

5:30 a.m. and then fired him thereafter, between 6:30-7:00 a.m. He further testified that he and Mowbray inspected the damage and at that point Mowbray determined that Jiminez would have to be fired also so that at 7:30 a.m. he ( Cardenas) so notified Jimenez.

Cardenas also testified that Jimenez was not as good a worker as Zermeno and had a bad absenteeism record, though he had never before damaged any property.

4. The Repair

Mowbray testified that he called the Merrill Ditch-Liners Company to bring its equipment out in order to begin cleaning out the ditch that was filled up, to haul soil and dirt into the area in Field 14 to rebuild the pad, and to remake that portion of the cement ditch that had washed away. As to Field 18, part of that cement ditch was also washed out and had to be replaced. Mowbray testified that his first priority was to repair the washed away portion of the ditch on the main canal system so that the ditch would be usable again since Respondent had to cease operations for a short time on some fields north of Field 14. According to Mowbray, Merrill Ditch employees began working within a few days but that it was not necessary to do all the repair work at once since the fields were still wet. In the case of Field 18, it had just been irrigated so the field could wait a few days.

The Merrill Ditch invoice introduced into evidence (Resp.'s Ex. 28) described the damage as a concrete ditch wash-out in the northwest corner of the Filaree Ranch. Merrill Ditch's Ken Bishop testified that it was one incident which resulted in the wash-out of the ditch in the northwest corner of Field 14 and the cement ditch at the end of Field 18. Bishop testified the damage was extensive, as demonstrated by the bill for $3,113.05 for three days' work.40/

Tractor foreman Silva testified that the wash-out was so serious that the only thing his tractors were able to do was to make some room on the other side of the wash-out inside the field so that one of the land levelers could get in and haul dirt away. He described the damage as worse than Zermeno's.

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40. The first page of Resp.'s Ex. 28 shows the date of April 30, 1980, but Bishop testified that that was the date of the billing and that the work order itself was made out on April 1, 1980.

5. Union Activities

Atilano Jimenez testified that he was an alternate on the Negotiations Committee and was first elected in January of 1980. 41/ He testified he attended three negotiating meetings, February 20, 1980, March 25, 1980, and one other meeting in March.42/ Jimenez also signed the petition requesting collective bargaining (G.C. Ex. 3), and testified that he and Zermeno gathered signatures for it among the crew.

E. Analysis and Conclusion

Applying the Wright Line, supra, Nishi Greenhouse, supra test to the facts of the Jimenez matter, it seems to me that protected conduct was a motivating factor in the Jimenez discharge. I find evidence in the record to support an inference of unlawful motivation. First, I have found that Cardenas became aware of Jimenez' Union support when the latter delivered the Zermeno unfair labor practice charge. Second, I have concluded that Cardenas assigned Jimenez more difficult work because of this activity and thereby violated the Act. Next, I found that Cardenas also violated the Act by his sarcastic criticism of Jimenez' filing of his own unfair labor practice charge; and finally, I decided that Cardenas' remark, suggesting that in the future Jimenez would be treated differently, was likewise violative of the Act. This statement was particularly significant, in view of Jimenez discharge approximately three weeks later. And of course, it is clear that threats, transfers to jobs involving more arduous duties, and harassment of employees evidences anti-union animus sufficient to satisfy the Wright-Line motivating factor test. Russ Togs, Inc. 253 NLRB No. 99 at 2 n. 2, 106 LRRM 1067 (1980).

Moreover, Mowbray could hardly have been said to have conducted much of an investigation before deciding to discharge both Jimenez and Arias. Mowbray testified he saw the damage and immediately instructed Cardenas to fire whomever was working in the vicinity at the time the wash-out occurred.43/ It was only after he had been discharged that Jimenez had the opportunity to speak to Mowbray and ask for his job back arguing that it had not been his fault. But Mowbray had no intention of listening to his side of the story.

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41. Jimenez testified it was January of 1979, but it is now clear he meant 1980.

42. C.P. Ex. 5 indicates that Jimenez attended only two sessions, February 6, 1980 and March 13, 1980.

43. Cardenas testified that by this time he had already fired Arias.

Thus, the burden shifted to Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. I think it met its burden. Respondent's evidence has convinced me that there was a business justification for the discharge and that Mowbray's conduct in the circumstances was reasonable. In Mowbray's view, the justification for the discharge was simple: the control gate that regulated the flow of water on Field 14 (G.C. Ex. 9, "A") was the pivotal point of the whole problem that caused the wash-out. Whose responsibility that gate was Mowbray didn't know and testified that as of the date of the hearing, he still didn't know. But because two irrigators were working on the same canal in the same area, he came to the conclusion that he could not separate who was actually supposed to control that one gate so he terminated both irrigators. In his opinion, each had to bear some responsibility since each was working in the general vicinity of a common ditch that carried water to several different field locations; that Jimenez happened to be watering one field and Arias happened to be watering another, and that between the two of them, both had control over all the water in that ditch. Under this theory, once the water passed through Field 14 into adjacent fields, it became the responsibility of whomever was working this next field to notice the water level and take corrective action. As the water level would either drain or rise depending on whether the gate was lowered or lifted, both irrigators -- whether they were at the main checkpoint or further on down the ditch -- should have noticed the problem early enough to have prevented significant damage.

In my judgment, the General Counsel did not respond satisfactorily to Respondent's business justification. Rather than argue with the factual basis for the discharge -- Jimenez' indirect responsibility to have observed the water level at an earlier time --, she mainly argued that the proof of the allegation lay exclusively in Arias' admission of fault and in the lack of a proper investigation by Mowbray. While I am not very impressed with Mowbray's disinclination to: 1) conduct a proper investigation by getting Jimenez' version of the facts before deciding to terminate him, 2) give any consideration to his prior job performance, 3) review whether he had previously received any disciplinary warnings or actions for negligent conduct, still, I cannot say that under the standard I am bound to follow, Mowbray's conduct was unlawful.

Moreover, General Counsel did not adequately respond to Respondent's argument that discharge was required here because the extent of damages was so much greater than in other instances. In reality, there can be no question but that the damage was extensive. In fact, General Counsel conceded that Jimenez "was fired following a major wash-out." (G.C. post-hearing Brief, p. 56). And Jimenez agreed that several photographs of the scene, taken immediately after the event, were accurate. (See Resp's. Exs. 10-13 inclusive). These photos, seen in conjunction with the Merrill Ditch records (Resp's. Ex. 28), illustrate the degree of wash-out that occurred.

In addition, as was shown in the preceding section, General Counsel failed to show that in comparing the damage here and the fact that it was arguably the fault, in whole or in part, of both irrigators, that the discipline meted out was inconsistent with that imposed in other instances.

There is one part of Respondent's business justification, however, that merits additional comment. Mowbray's statement as to his reasons for the discharge of both Jimenez and Arias appear to suggest an inconsistency; i.e., that at one point Mowbray could not decide which irrigator was at fault so he decided to terminate them both; at another point, he decided both were responsible since they were both using the same water. Assuming arguendo that this was a contradiction,44/ I do not believe that this was the kind of "shifting reason" for discharge that would lead me to conclude that it was a mere pretext for anti-union motivation. I was impressed with Mowbray's sincerity over his concern with what he regarded as extensive damage to Respondent's property and his intent, perhaps motivated by more emotion than though at the time, to eliminate from his employ any irrigator who may have been in any way connected with the incident. Though I am a little troubled by Mowbray's (arguable) "shift" in the reasons for the discharge, suggesting that Respondent failed to carry its burden under Wright-Line, on balance, after weighing all the testimony and Briefs, I cannot in fairness say that Mowbray's conduct was so unreasonable or outrageous as to constitute a pretext. I find that the preponderance of the evidence suggests that Jimenez would have been fired regardless of his Union activities. Or, to state the converse, the General Counsel has been unable to prove by a preponderance of the evidence that Jimenez would not have been terminated "but for" his Union activities.

I recommend the dismissal of this allegation.

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44. It could be argued that this position is not inconsistent since what Mowbray was referring to as "at fault" was who was primarily responsible for the control gate that regulated the water on Field 14 which was, according to Mowbray, the pivotal point of the problem that caused the wash-out. To say that Mowbray did not know who was at fault at the gate is not necessarily to say that he thereby did not intend to attribute any blame whatsoever to other phases of the job performance.

V. Vacation Pay

A. Facts

Zermeno testified that after he picked up his paycheck on the day he was discharged, March 4, 1980, he also picked up his vacation check (G.C. Ex. 12) in the amount of $140.00, minus deductions. He testified that his complaint was that other workers received $200.00. Zermeno also testified that this was the first vacation pay he had ever received.

Jiminez testified that he did not receive vacation pay for 1978, 1979, or 1980 and that when he was discharged, he asked about his vacation pay and was told that Mowbray's position was that he was not entitled to it because he had started in August and would have to wait until June. Since others he knew had received $200.00 in vacation pay, Jiminez' position was that he should receive it as well.

Arias testified that he too did not receive any vacation pay, inquired about same at the time of his discharge, and was told by Cardenas that Mowbray had said he was ineligible because he had started working in July.

The General Counsel also called Alejandro Martinez and Ignacio Chaparro as witnesses. Martinez testified that he had received vacation pay in 1979 and 1980 in the amount of $200.00 (G.C. Ex. 14) and that the others received the same for vacation too. Chaparro testified he received $200.00 vacation pay in 1978 through 1980 inclusive and that other workers received the same amount. He was not aware of anyone receiving more or anyone receiving less than $200.00.

Roy Ortiz, Assistant Vice President of Administration and head of the payroll department since 1972, working out of Respondent's main office in Phoenix, Arizona, testified that it was the policy of Respondent to award vacation pay to employees who had worked at Respondent's for at least one year as of the closing date of June 30 and that vacations were usually paid at the end of June or the first couple of weeks of July. Although this eligibility rule cannot be found in writing and there was no such thing as a company manual, Ortiz testified that this rule had been in effect since 1972 when Respondent commenced to do the payroll out of the Phoenix office. Thus, an employee who was hired on July 1 but was fired on June 29 would not be on the payroll list as of June 30 and therefore, would not receive a vacation check.

However, there was some flexibility. Mowbray testified that if a worker had been laid off (as opposed to discharged) and there was just a short time to go until the June 30 date, then he would have the authority to make an exception. Likewise, an employee on the payroll as of June 30 might still receive vacation pay even though he/she had been laid off for 2 months during the year. In any event, in both these examples, the employee would

still receive the full $200.00 vacation pay; 45/ the money would not be prorated.

Ortiz also testified that the only instance since he had participated in the preparation of the vacation payroll where someone got vacation pay prorated who was not on the payroll as of June 30 was Juan Zermeno. Ortiz explained that in that case Mowbray had called him and asked him to do it because Mowbray represented that he had promised the vacation pay to Zermeno.

Mowbray testified that upon Zermeno's termination, he called Ortiz in the Phoenix office and indicated that Zermeno should be paid for some vacation. According to Mowbray, Ortiz opposed this idea because of Respondent's above-mentioned practice but upon Mowbray's insistence, 46/ it was decided to issue a prorated check to Zermeno for $140.00, which was supposed to represent his estimated average weekly earnings. 47/ Mowbray testified that in retrospect, his demand to Ortiz for a vacation check for Zermeno was in error, and Zermeno should not have been allowed to receive this payment because he (Zermeno) was not on the payroll as of June 30, 1980. Referring to Zermeno, Mowbray testified: "He received one check by error for vacation pay, which as per company policy, he was not supposed to receive, but did receive through my insistence and ignorance of company policy at that time." (TR. 7, p. 89.) 48/

B. Analysis and Conclusion

The General Counsel concedes that the policy of Respondent is to award vacation pay only to those workers who are on the payroll as of June (G.C.'s post-hearing Brief, p. 70). But despite this, General Counsel argues that a total of $200.00 (instead of $140.00) should have been paid to Zermeno, and that, in addition, Jiminez and Arias should also be entitled to receive vacation pay

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45. Workers who earned more in their jobs received greater vacation pay. Ortiz testified that the rate established was $300 for tractor drivers and $200.00 for irrigators and general laborers, and that this figure was arbitrarily arrived at years ago (G.C. Exs. 4 and 5).

46. Mowbray had operated in similar fashion at his last place of employment. At the time of Zermeno's discharge, Mowbray had been working at Respondent's for only a short while, probably 3 or 4 months.

47. Mowbray testified that Zermeno had been working at Respondent's since the previous July or August, and he estimated his vacation pay on the basis of around half-a-year.

48. Mowbray testified that since Zermeno's firing, two other persons had been discharged (presumably Jimenez and Arias) but that they did not receive vacation checks because he was made to understand that this was not the policy of Respondent.

though all three were terminated in March. It is the General Counsel's contention that Respondent withheld vacation pay discriminatorily from the paychecks of Zermeno, Jimenez and Arias, 49/ in violation of Sections 1153(a) and (c) of the Act.

General Counsel has not carried her burden of proof. The evidence indicates that to be eligible for vacation pay, one had to be on the payroll as of June 30. (G.C. Exs. 4, 5, 14, and 22.) Since it cannot be said that Zermeno, Jimenez and Arias were employed on that date, they were not eligible for vacation pay unless the General Counsel could demonstrate that these three individuals were treated any differently from any of Respondent's other employees or that the vacation policy was administered in a discriminatory, inconsistent manner. This the General Counsel has failed to do.

Rather than showing that Respondent discriminatorily treated Zermeno by paying him less than he should have received, the evidence suggests that he was paid for vacation when ordinarily, under the policy, he would have been entitled to no pay at all. It was only because Mowbray, relatively new to Respondent and accustomed to other procedures, prevailed upon Ortiz to deviate from the established practice and to prorate vacation pay to an employee who fell way short of the June 30 eligibility date.50/

Though the General Counsel argues that the record reflects that Jimenez and Arias had worked more than a year, the record is actually quite deficient as to exactly when they started each year in question,51/ and whether the year was broken by layoffs or other types of work interruptions. There is, in any event, no evidence that they were on the payroll on June 30, yet denied vacation pay.

In the case of Zermeno, it is worthy of note that he testified that the March 1980 vacation pay was the first he had ever received. This fact is perfectly consistent with Respondent's

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49. The First Amended Complaint also alleged that Does 5 to 14 were discriminated against and paid less or no vacation pay. General Counsel produced no evidence regarding these unnamed individuals during the hearing herein and makes no argument regarding them in her post-hearing Brief.

50. With the exception of signing the petition (G.C. Ex. 3), which most of the employees in the farming operation also did, Arias did not participate in any concerted or union activities. Thus, we have the situation where Arias received no vacation pay when the policy was followed and Zermeno, whom the General Counsel claims to be a strong Union supporter, received some vacation pay when the policy was deviated from.

51. General Counsel gives some indication that she claims vacation pay for 1978 and 1979. But this claim is untimely as being outside the six-month limitation of Section 1160.2 of the Act.

policy since Zermeno commenced working for Respondent in August of 1978 and would not have completed one year of service as of June 30, 1979. He would have been eligible for his first full vacation payment on June 30, 1980, had he not been termiated on March 4, 1980.

Nor can it be said that Respondent's policy is unlawful because, as Ortiz testified, exceptions were sometimes made at the discretion of Mowbray, where it would be unfair to do otherwise; e.g., where a worker would have completed one year of service but for a short layoff. There is, first of all, no evidence of to whom or how often vacation pay under those circumstances was granted. And secondly, there was no showing that such deviation from Respondent's policy, if ever effectuated, was administered in a discriminatory manner or had the effect of discriminating unfairly against union adherents.

Finally, at one point in her post-hearing Brief, the General Counsel argued that the June 30 eligibility date was the date when there were fewest numbers of workers available. Although this argument might reflect upon the narrow coverage of Respondent's vacation policy, it does not cast light in any manner on the question of whether the policy in and of itself is discriminatory or leads to a discriminatory result.

Accordingly, I recommend that this allegation be dismissed.

VI. Threats of Reprisal

A. Facts

General Counsel contends that in February and March, 1980 foreman Cardenas made certain threats of reprisal to employees because of their union affiliation.52/

Alejandro Martinez testified that he had been an irrigator with Respondent for three years and that Cardenas was his foreman. He testified that in February of 1980 he, along with several others, signed the petition (G.C. Ex. 3) demanding that Respondent negotiate with the UFW.

Martinez testified that he had many complaints against Cardenas because of the way he was treated and that Cardenas pressured him in his work. For example, Martinez testified that on February 9, 1980, he was reprimanded by Cardenas at Field 30 over the drainage of a field, that Cardenas yelled and cursed at him to go faster and told him to defend himself with a shovel. According to Martinez, Jesus Ramirez and Tony Villegas were both present and heard this conversation.

Further, it was Martinez' testimony that on March 4, 1980, the day of Zermeno's discharge, Cardenas told him that he had to work harder because if he didn't, he'd get rid of all "of us" and that Cardenas also said: "right now, I cannot get rid of you, but when the Union comes, I will fire you." (TR. 3, p. 155.) Martinez testified that Jesus Ramirez was present when this was uttered, and Tony Villegas, who was listening, was close by, as was Jose Arias.

Finally, according to Martinez, on March 6, 1980,53/ Cardenas informed him of Zermeno's discharge and told him that from now on he and the rest "of us" would go one by one; and that Jesus Ramirez, Tony Villegas, Jose Arias, and two others were present for this conversation, as well.

Cardenas testified that in March of 1980 he reprimanded Martinez verbally for a poor work performance on Field 22, that Martinez became very angry, picked up a shovel and made a movement as if he was going to throw it. Cardenas testified that they never spoke that harshly to one another again.

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52. Respondent moved to dismiss this allegation (paragraph 14(f)) on the grounds that it asserted multiple threats and the evidence suggested only a threat to one person, Martinez. I reserved a ruling. The motion is overruled.

53. There is some uncertainty whether the March 4 and March 6 conversations were the same or different conversations. For clarity's sake, I have separated them into two separate occurrences.

When asked whether he had any conversation with any of the irrigators following Zermeno's discharge, Cardenas testified that he "told them that if something like what had happened to Zermeno, the following person who committed the same error would also be fired, and this was by orders of my boss." (TR. 9, p. 50.)

B. Analysis and Conclusion

1. Alleged Threat of February 1980

I note at the outset that this conversation contains no reference to union or concerted activity. It was simply a work-related disagreement between an employee and his foreman. The General Cousel attempted to show that this antagonistic conversation was a direct result of a charge being filed by Martinez. However, although Martinez testified in a confusing manner about the date of the alleged incidents, he eventually settled on February 9 54/ as being the date of the work dispute while the charge was filed and served on March 7. (G.C. Ex. 1(j)). 55/ Thus, the charge was filed sometime after the February incident and not before.

In any event, even if the incident occurred in March, it seems to be the result of a personality conflict between the two men, each blaming the other for threats and cursing.

2. Alleged Threats on March 4, 1980, and/or March 6, 1980

I do not credit the alleged March 4 statement: " . . . right now, I cannot get rid of you, but when the Union comes, I will fire you." In the first place, as translated, the remark makes no sense to me. I would think the converse would be true. Second, though I believe Martinez tried to testify in a truthful manner, his testimony was so confusing and difficult to follow that I cannot give it much weight.

As to the March 6 statement that he (Martinez) and the rest would go one by one, I am unwilling to speculate that the statement was motivated by anti-union animus. An equally reasonable interpretation was that given by Cardenas that he meant to emphasize with his crew that serious wash-outs, as occurred in the Zermeno incident, would not be tolerated. Although I have discredited

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54. The First Amended Complaint refers to a February 6 event. On the other hand, Cardenas places the occurrence in March and testified that one or two days after the work dispute, Martinez handed him an unfair labor practice charge.

55. Martinez at first testified that he filed the charge on March 8, 1980, then said he didn't know when he filed it, and next testified he filed it on the same day in the afternoon that he was reprimanded, presumably the February 9 date.

Cardenas in other instances, I am willing to accept his interpretation here.

Moreover, when asked if any foreman, besides Silva, had ever made any anti-union remarks, Martinez replied, "No." The General Counsel then tried to rehabilitate her witness by asking him if he had ever heard his foreman (Cardenas) make any anti-union remarks and he again answered, "No."

Finally, I note that Jesus Ramirez, Tony Villegas, and Arias were present during the March 4 and/or March 6 conversation; yet, the first two were not called as witnesses, and Arias was not questioned about these events when he testified. The General Counsel has the burden of establishing by a preponderance of the evidence that the threatening statement was made. The failure of General Counsel to question Arias regarding such statements or to call other percipient witnesses to the event permits an inference that their testimony would not have corroborated Martinez on this point. (Warehouse Union Local No. 860 (1977) 231 NLRB 838.)

I recommend the dismissal of this allegation.

VII. The Transfer to a Less Desirable Position and the Layoff of Jose Espinoza

A. Facts

Jose Espinoza was first employed by Respondent in August of 1979 and was laid off in March, 1980. During that time, he worked under Cardenas as a sprinkler, shoveler, and irrigator and under Silva as a tractor driver.

Espinoza testified that he was hired as a sprinkler but that he had told Cardinas early on that he had been a tractor driver in the past and that he was interested in doing tractor work again especially since it paid more.56/

Thereafter, Espinoza was employed as a tractor driver. According to Espinoza, he never spoke to tractor foreman Silva about the job but was informed by Cardenas that he would be working as a driver starting around December 8, 1979. He further testified that he worked for around three weeks in December and then again commencing on January 8 for nine weeks, but that in March, Silva informed him he had no more work and recommended that he see Cardenas. Espinoza also testified that at no time did he and Cardenas or he and Silva discuss how long the tractor job was going to last.

Finally, Espinoza testified that immediately following the Silva layoff he did speak to Cardenas, was offered the position of shoveling once again, which he accepted, but was laid off one week later along with three other shovelers.

Silva testified that Espinoza worked for him for two months (January through March) as a caterpillar driver and was laid off on March 18, 1980. According to Silva, it was Cardenas who had originally asked him to hire Espinoza.

Silva testified he had to lay off Espinoza because of lack of work and that at the time of his hire, he had explained to Espinoza that he was only going to drive the tractor for a short time.

Recognizing that Espinoza would have to be laid off, Silva testified he spoke to Cardenas and found out shoveler work was still available. In that Espinoza was being transferred back to Cardenas' crew, Silva testified he did not consider it a true layoff and therefore, did not find it necessary to fill out Respondent's "layoff form."

According to Silva, at the time of Espinoza's hire, there were four tractor drivers working for him, Abraham Paul, Esteban

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56. Sprinklers were paid $3.50 per hour; tractor drivers, $4.50.

Padilla, and two brothers, Casey and Richard Flores. Silva testified that although they remained after Espinoza went back to the shoveler classification, they were all laid off a short time thereafter. When the need for tractor drivers increased in June (C.P. Ex. 3), both Flores' returned because, according to Silva, they had kept in touch with him. Silva also admitted to hiring a new driver, Pedro Vasquez, also in June, through the State Employment Department, hereinafter referred to as the "E.D.D.". Silva testified it was not his practice to seek out for work drivers whom he had previously laid off.

Cardenas testified that Espinoza was a shoveler and an irrigator under his supervision and was hired on September 26, 1979, worked until January 8, and returned to work for Cardenas again two months later but was laid off on March 25, 1980.

Cardenas testified that in January of 1980 tractor foreman Frank Silva had been looking for a tractor driver for a month or two and had asked him if he knew anyone who could do the work. Cardenas testified that he recommended Espinoza, and he was hired but that he told Espinoza that when his tractor driving position ended, he would come back to Cardenas as a shoveler. A short time after this, Cardenas testified that he was asked by his supervisor, Mowbray, to cut back the shovelers from sixteen to eight57/ which he did, and Cardenas was one of those laid off. Questioned about how he decided who was to be laid off, Cardenas testified that he looked at the capacity58/ of each individual and in this case, he tried to leave those who knew how to repair ditches and had experience in irrigation.

Mowbray also testified. According to him, it became necessary to start to lay off tractor drivers in approximately February of 1980 because Respondent was running short of tractor work. As to who among the tractor drivers was to be laid off, Mowbray testified that he, along with Silva, decided and that it was basically a subjective decision as to who were the better drivers. Mowbray testified that he spent eighty-five to ninety percent of his time in the fields and had ample opportunity to observe who was more competent than others. He also testified that another consideration was the fact that Espinoza had the least amount of service of anyone in the tractor classification.

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57. In rather confusing testimony, Cardenas, having difficulty getting the names straight, finally corrected his testimony to indicate that it was seven workers who were laid off, only five of which were shovelers, as follows: Jose Espinoza, Monico Avila (shoveler), Juan Valdez (shoveler), Alfonso Valenzuela (shoveler and sprinkler), Jose Cardenas (shoveler and sprinkler), Jose Arias (irrigator) and Atilano Jiminez (irrigator). (The latter two employees were discharged on March 31, 1980, supra.)

58. Cardenas defined "capacity" as the ability to do different types of work.

In deciding who was to be laid off from the shoveler crew, Mowbray testified that he and Cardenas went through the list of employees one by one, excluding irrigators because they were year-round, and basically decided to keep people whom they felt were more flexible and versatile. When asked whether Espinoza were not versatile, Mowbray testified that Respondent already had other tractor drivers coming back in the spring, could not use him as a sprinkler (C.P. Ex. 3), and that Espinoza did not generally meet his definition of versatile.59/

Union Activities of Espinoza

Espinoza testified that he signed the petition (G.C. Ex. 3) and wore a UFW button to work for about a month in January of 1980, but that there was no discussion between Cardenas and him about these matters. Espinoza further testified that his only other activities consisted of attendance at meetings at the UFW office in Calexico. When asked whether Cardenas was aware that he had supported the UFW, he testified he did not know.

Silva admitted seeing Espinoza wear a UFW button in December of 1979 but testified he had never heard of the petition, never saw it, and never heard of Respondent's management personnel talking about it.

Silva's Note to the Personnel File

Joint Exhibit 5 is a handwritten note Silva wrote which he placed in Espinoza's personnel file which sets forth the reasons for his trasfer from tractor driver to shoveler. The note makes it clear that Espinoza was trasferred because there was no more tractor work for him but Silva alsowrote: "I in no way had any reason let him go to Jose Cardenas crew because of any Union dealing because I in no way have any idea he belong to the Union." (sic)

Mowbray testified that he asked Silva to write the note because: "...we were moving a man from one job to another and subsequently, the man was laid off and I felt it would be good to have that information in my file." (T.R. 7, p. 126). Although Espinoza was transferred, as the note reflects, from tractor driver back to shoveler around March 17, Mowbray testified that the note was written after Espinoza was laid off from Respondent's employ but that he didn't remember the date of the layoff. He further testified that he didn't tell Silva what to say; he simply told him to put down in his own words the situation as he saw it. Mowbray

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59. At first Mowbray defined "versatility" as being more than the ability to perform Respondent's established job classifications and included an employee who would work at unpopular jobs; e.g., repairing ditches, working on concrete walls, etc. Later, however, in answer to a question from Charging Party, he defined it as a worker capable of doing irrigation, sprinkler pipe, shovel and tractor work.

specifically denied suggesting to Silva that a clause concerning union activity should be included. Mowbray admitted that normally explanations for job changes were not placed in writing.

B. Analysis and Conclusion

1. The Trnasfer to the Less Desirable Job

The reassignment of a worker from one type of job to another less desirable one, if motivated by anti-union animus, is a violation of Sections 1153(c) and (a) of the Act. Kawano, Inc., 3 ALRB No. 54 (1977). On the other hand, changes in working conditions, if supported by a valid business justification, are not a violation. Sam Andrews' Sons, 5 ALRB No. 68 (1979).

The General Counsel argues that in December, 1979 Espinoza became a tractor driver and earned $4.50 an hour but that after signing the petition demanding that Respondent negotiate with the UFW (G.C. Ex. 3), he was moved back to the lesser paying job as a shoveler at $3.50 per hour. This is said to have occurred in retaliation for his union acitivities and support and the filing of charges with the ALRB.

I disagree, In the first place, Espinoza himself testified that he signed the petition in December of 1979 but could not remember if it was before or after he started as a tractor driver. 60/ If he had signed the petition before, why would Respondent, given General Counsel's theory, have transferred him to the tractor classification in December, only to transfer him to an inferior position three months later? If, on the other hand, he was already working as a tractor driver in December when he signed the petition, why would Respondent, again given General Counsel's theory, keep him in that job classification for the remainder of December and until March 17, suddenly give him a job at less pay for one week, and then lay him off?

Second, through General Counsel contends that Respondent transferred Espinoza to a lesser position, I see it as merely a reassignment to the laborer classification for which he was initially hired.

Third, there is not sufficient evidence of Espinoza's Union or concerted activity for me to conclude that as a result of it, he was transferred to a less desirable position. Though Espinoza signed the petition, (G.C. Ex. 3), so too did almost everyone else employed at the Fillaree Ranch. All that General Counsel has shown is that Espinoza was a Union supporter, wore a Union button at times, and was observed doing so by tractor foreman Silva. But, as

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60. Espinoza testified he worked a short time (three weeks) as a driver in December, though this was not corroborated by Respondent's witnesses who testified that Espinoza did not commence tractor work until January.

evidenced by the existence of the petition, the vast majority of the other workers supported the Union, as well. There is no credible explanation of why Espinoza was singled out for special treatment. I do not find that General Counsel has established a prima facie case of discrimination.

In any event, even if she had, I credit Respondent's business justification for transferring Espinoza from tractor driver back to shoveler. As will be seen, infra, work at the ranch was showing down not only for shovelers but for tractor drivers too. And one week following Espinoza's transfer, two experienced tractor drivers -- the Flores brothers -- were laid off, followed a short time thereafter by Padilla.

But there is, of course, still the question of the Silva note (Jt. Ex. 5), placed in Espinoza's file. This is potentially very damaging to Respondent since normally Respondent does not place job changes in writing, Mowbray could give no reasonable explanation as to why it was done in this case and the communication was so self-serving, that it suggests the converse of the message that was intended to be conveyed.

Nevertheless, I am willing to accept Mowbray's version that he instructed Silva to write the document after Espinoza's layoff from Respondent or around March 25, 1980. This being the case, it is reasonable to assume that the Silva note, clumsy though it was, was merely reflecting Respondent's knowledge that an unfair labor practice charge had been filed concerning the matter. On March 19, 1980 Charging Party served on Respondent a charge, Case No. 80-CE-157-EC, (G.C. Ex. 1(M)), alleging that on March 17, Espinoza had been demoted from tractor driver to "irrigator" because of his union activities.

Though I agree with General Counsel that the exhibit is evidence of Respondent's knowledge of union activities, I am not convinced that it proves discriminatory intent in the layoff.61/

I recommend the dismissal of this allegation.

2. The Layoff

The General Counsel has the burden throughout of establishing the elements of a discriminatory discharge, and this burden never shifts. NLRB v. Winter Garden Citrus Prod. Coop., 260

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61. The First Amended Complaint also alleges that Expinoza was given a lesser job because he filed charges with the ALRB, but it is uncertain which charges this refers to, and General Counsel does not address the matter in her post-hearing Brief. The charge underlying the present discussion of less desirable work (Case No. 80-CE-157-EC) refers to a previous charge filed by Espinoza (Case No. 80-CE-40-EC). But a reading of that allegation does not seem to relate to any issue in the instant case.

F.2d 913, 916 (5th Cir. 1958); Indiana Metal Products Corp. v. NLRB, 202 F.2d 613, 616 (7th Cir. 1953); Lu-Ette Farms, Inc., 3 ALRB No. 38 (1977).

To constitute a violation of Section 1153(c), the discrimination in regard to tenure of employment must have a reasonably tendency to encourage or discourage union activity or membership. An employer may lay off or discharge any employee for any activity or reason, or for no reason without violating that seciton, so long as its action does not have such a tendency. O. P. Murphy Produce Co., Inc., 7 ALRB No. 37 (1981); NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); NLRB v. South Rambler Co., 324 F.2d 447 (8th Cir.).

"To establish a prima facie case of discriminatory discharge in violation of Sections 1153(c) and (a) of the Act, the General Counsel is obliged to prove by a preponderance of the evidence that the employee was engaged in union activity, that Respondent had knowledge of the employee's union activity, and that there was some connection or causal relationship between the activity and the discharge." Jackson & Perkins Rose Co., supra, 5 ALRB No. 20 (1979). See also, Verde Produce Company, supra, 7 ALRB No. 17 (1981).

Based upon a conversation subsequent to the layoff, infra, (see Refusal to Rehire section immediately following) in which Cardenas told Espinoza that he was laid off because of his support for the Union, I find that the General Counsel has established a prima facie case. However, I further find that Respondent produced ample business justification for its action. Espinoza was laid off sometime within the week ending April 1, 1980. (Resp's. Ex. 23). Respondent argues that shovelers reach their peak from mid-September to the end of February and that after February there are only three to five shovelers employed. (Resp's. post-hearing Brief, pp. 36-37). Thus, it argues that Espinoza was laid off as part of a normal pattern of a reduction in force around that time of year. The evidence bears out this position.

Respondent's Exhibit 23 demonstrates that although there were twenty workers62/ employed as of the week ending March 25, 1980, that number had been reduced to thirteen by the end of the

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62. These figures include irrigators who are usually year round.

following week, April 1,63/ the last week Espinoza worked, and further reduced to eleven (weeks ending April 8 and April 15) and finally to ten (weeks ending April 22 and April 29).

Furthermore, the document shows that the last week of Espinoza's employment -- March 25 to April 1 -- evidences a sharp reduction in the number of working days; e.g., Espinoza only worked two days (five the previous week); and the same was true of many of his co-workers, as well.

As referred to earlier, not only shovelers but also tractor drivers were laid off during this time period. The last week worked for Casey and Richard Flores, senior 64/ to Espinoza, was March 25 and Esteban Padilla's last week was April 15 65/ (Resp's. Ex. 23).

The General Counsel also argues that irrigation work was available because of the Zermeno, Arias, and Jimenez terminations and that Espinoza, also being an irrigator, could have been assigned that job. (General Counsel's post-hearing Brief, p. 65). First, Arias and Jimenez were fired on March 31, 1980, and it appears Espinoza was either laid off prior to that or at around the same time. Second, although Zermeno was fired, General Counsel failed to prove that his slot was ever filled and by whom. And finally, Espinoza was not hired as an irrigator but as a sprinkler and did shoveler and later tractor driver work. When the tractor work finished, he went to work with Cardenas as a shoveler. Although Espinoza testified he also irrigated, the record is incomplete as to how long, for what period of time, and what he did.

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63. This included many shovelers. Respondent's payroll document reflects that all five shovelers mentioned by Cardenas in footnote 57 were in fact laid off together as of March 25, 1980.

64. Seniority is not really at issue here. Though General Counsel argues that Espinoza received less desirable work and was laid off in violation of Respondent's "seniority system," there is insufficient evidnece on which to conclude that such a system existed. Besides, even if General Counsel had demonstrated a seniority system, Espinoza would hardly qualify for much consideration since his date of hire was only August of 1979. In any event, General Counsel failed to prove that others kept on the job were junior to him.

65. Casey Flores returned to work during the week of May 20. His brother, Richard, only returned for two weeks, the weeks ending May 27 and June 3. Padilla also returned May 20, but it's not clear from the record whether it was as a tractor driver. (Resp's. Ex. 23). Abraham Paul appears to have worked virtually the entire year.

Respondent has convinced me that seasonal reductions were the real reason for the layoff and that anti-union motivation was not its basis.

I recommend the dismissal of this allegation.

VIII. THE REFUSAL TO REHIRE JOSE ESPINOZA[66]

A. Facts

Espinoza testified that at the time of the March layoff, Cardenas informed him there was very little work but told him to check with him in two weeks. Espinoza testified he did check, only to be told to come back again. Espinoza decided to see Cardenas personally at his home so he and his wife, Celia, on a Sunday in the latter part of April, went to the Cardenas house.[67] According to Espinoza, he asked for work, and Cardenas told him that "they could not employ me there any longer because -- because I was involved with this thing with the Union." (Tr. 6, p. 6). Espinoza further testified that Cardenas also said that except for the Union, he could have remained full time because he knew how to do everything but the general foreman (Mowbray) did not want him there. Espinoza testified that this was the first time he and Cardenas had ever talked about the Union.

Espinoza further testified that he checked with Silva in October, 1980 and was told there was still no work and again checked around December 8, 1980 with the same result.

Espinoza's wife, Celia, basically corroborated his testimony. She testified that in April, 1980, two weeks after he had been laid off, she drove with her husband to Respondent's place of business where he had intended to inquire about work.[68] She further testified that she was present in Cardenas' home when her husband asked for work and at a distance of six feet heard Cardenas say that there was no work for Espinoza because the general foreman had told him (Cardenas) that he did not want persons like her husband working there because they had many problems with the Union.

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66. Although not alleged in the First Amended Complaint, I find that this matter should be considered as an independent unfair labor practice issue. The Board is not precluded from finding a violation of the Act notwithstanding the absence of a specific allegation in the Complaint where the issue is related to the allegations of the Complaint and is fully litigated at the hearing. Harry Carian Sales, 6 ALRB No. 55 (1980); John Elmore, Inc., 4 ALRB No. 98 (1978); Prohoroff Poultry Farms, 3 ALRB No. 87 (1977), enf'd in relevant part in Prohoroff Poultry Farms v. ALRB, 107 Cal.App. 3d 622, hg. den. July 30, 1980. In the instant case, it was argued in the post-hearing Briefs of the parties, as well. (See, for example, Respondent's Brief at p. 39).

67. The Espinozas knew the Cardenas family personally because Celia Espinoza was Cardenas' wife's niece.

68. She remained in the car and did not overhear the conversation between Espinoza and Cardenas.

Mrs. Espinoza also testified that she was present in October and December, 1980 when Jose Espinoza asked Silva for work.

As an adverse witness for the General Counsel, Cardenas testified that the last time Espinoza worked for him was March of 1980, and indicated that he had not seen him since then. He testified as follows:

> Q: What did you tell Mr. Expinoza when you were laid off?
> A: There was no more work for that moment.
> Q: Did you tell him when work would be available again?
> A: Two or three months later.
> Q: Did you notify him when work was available?
> A: I never did see him again.
> Q: He never checked to see if work was available?
> A: With me he did not.
> Q: To the best of you knowledge, did he check with Frank Silva?
> A: No; I do not.
> Q: You have not seen him since you laid him off in March; is that correct?
> A: No, I have not seen him.

Yet, about two weeks later on direct examination by Respondent, Cardenas admitted having a conversation with Espinoza at his own home and that he told him there wasn't much work. Placing the event in June or July, Cardenas testified that as he was leaving his house, he observed Espinoza outside talking to his son,[69] and Espinoza called out to him and asked him "how is the work." Cardenas testified that he repolied that the work was slow and that there wasn't very much. When asked by Respondent's counsel whether he understood Espinoza to be asking for work, Cardenas testified: "not any one word that a person... will say to me that is out of the area of my work, principally at my home, I will not pay any attention to what they are saying to me, whether they say it jokingly or seriously. ...I understand that when a person is asking for work, that person will ask me for work at the job site." (Tr. 9, p. 45). Cardenas added that he thought that Espinoza was having a word game with him, that this was a free weekend (for Cardenas) to go to the mountains, that he was in a hurry to leave, and that he paid no attention to what Espinoza was talking about.

Silva admitted Espinoza asked him for a job once around December 23, 1980, and once in January 1981, and that he told him he was full and didn't need any drivers.

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69. Cardenas downplayed any personal relationship he supposedly had arising out of the familial ties between his wife and Espinoza's wife. Cardenas denied he had any relationship whatsoever with Espinoza prior to the time he commenced work at Respondent's.

B. Analysis and Conclusions

Failure or refusal to rehire employees on account of their union activity or union sympathy violates Labor Code section 1153(c) and (a) because such conduct constitutes discrimination in regard to hire or tenure of employment which tends to discourage union support or membership, and because it tends to restrain employees from exercising their right to join or assist labor organizations, Louis Caric & Sons, 6 ALRB No. 2 (1980). To establish a discriminatory refusal to rehire, the General Counsel must ordinarily show that an alleged discriminatee made a proper application for rehire and was not rehired as a result of union-related considerations. George Lucas and Sons, 5 ALRB No. 62 (1979). The General Counsel must show that Respondent would not have refused to rehire the employee but for his union membership or union activity. O. P. Murphy Produce Co., Inc., 7 ALRB No. 37 (1981).

I credit the testimony of Jose and Celia Espinoza regarding their conversation with Cardenas at his home in April. Both Expinozas testified in an earnest and straightforward manner. Their credibility is to be contrasted with Cardenas, whose testimony generally I have, on prior occasions, found to be unworthy of belief. (See, for example, the section, supra, concerning the threat to Jimenez for filing an ALRB charge). Here, besides the inconsistency I have addressed in this part, I would point out that Cardenas was evasive and sometimes inaccurate in his presentation of facts. I don't think his testimony was sincere, and he also showed an unwarranted hostility towards Espinoza. I believe the remark was made. It occurs to me to be the kind of "off the record" statement that might have cavalierly been asserted in this kind of a social setting. Nor am I very impressed with Cardenas' sheepish suggestion that he only discusses work availability at the job site.

Although I have previously found that Espinoza's union activity was not that different from others at the Ranch, it is now apparent that that activity, minimal though it was, evidently stood in the way of his being rehired. And the evidence of this discrimination came straight from the mouth of his foreman. It is clear that a statement that an employer refused to hire someone because of his union activity is as direct and convincing evidence of a discriminatory basis for employer conduct as there can be. It clearly establishes a respondent's knowledge or belief that an individual is involved in union activity and that that is the reason for not hiring or rehiring him. Louis Caric & Sons, supra.

Respondent's Exhibit 23 indicates that among the other shovelers laid off at the same time as Espinoza, two never returned, Valdez and Avila, but that both Cardenas' son and Valenzuela returned sometime during the first week in May. Respondent's Exhibit 23 also indicates that the work force increased to fifteen (from fourteen) the first week in June and to seventeen by June 24. By the end of July, the work force was twenty-one, and several new names appeared on the payroll list; e.g., Lorenzo Camargo, Guadalupe

Gonzalez, Herberto Abassa, and Florencio Vasquez.[70/]

Respondent's Exhibit 23 further demonstrates that after a short decline at the end of August, its work force did increase in September from thirteen on September 9 to twenty-three on the week ending September 30, increasing to twenty-eight workers as of the week ending October 7, reaching a peak of thirty on the week ending October 14 and remaining at twenty-eight until November 4, at which point it declined to nineteen for the week ending December 2.

Of the tractor drivers, all three of those laid off returned the week of May 20, Padilla, Casey and Richard Flores, but the latter only worked for two weeks. It is also to be recalled that Silva testified he needed drivers in June so he hired a brand new man through the E.D.D., Pedro Vasquez, who lasted through the end of the year. Around August 12, a new driver, Marvin Keaton, was hired, also through E.D.D.

Espinoza also testified that he checked with Silva twice about work, once in October of 1980 and again in December of 1980, and that Silva said that there was none available. The records reflect that this was an accurate assessment. (Resp's. 23; C.P. Ex. 3). Although the work force grew during October, these were mainly sprinkler jobs, as is traditional during that time; and there is no evidence to support the claim that tractor jobs became available.

Ordinarily, to establish a refusal to rehire violation, it must be proved that a proper application was made by the former employee at a time when work was available, the position was later filled and the employer's refusal to rehire the employee was motivated by his or her union sympathies. Prohoroff Poultry Farms, 5 ALRB No. 9 (1979); George Lucas and Sons, supra. However, there is an exception in those cases where making a proper application for rehire would be an exercise in futility. Kawano, Inc., 4 ALRB No. 104, enf'd, Kawano, Inc. v. ALRB, 106 Cal.App.3d 937 (1980); Abatti Farms, Inc., 5 ALRB No. 34 (1979), enf'd in relevant part in Abatti Farms, Inc. v. ALRB, 107 Cal.App.3d 317 (1980).

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70. Though Camargo and Vasquez only worked a short while, Gonzalea and Abassa were hired sometime during the week of June 17, and both were employed for the remainder of the year. (Resp's. Ex. 23).

In the instant case, the record reflects that Espinoza applied for rehire in April. Although Cardenas told him to check with him later, it is now obvious he had no intention of ever rehiring him, as he made clear to him in their April conversation at his house. By telling Espinoza that Respondent "could not employ [him] there any longer" because he was involved with the Union, Cardenas was making it pretty clear that work was no longer available to him and future application would have been a useless act. Louis Caris & Sons, supra.

Although it is not clear that work was available in April when Espinoza first asked to be rehired, it appears that shoveler work did become available the first week in May when Valenzuela and Cardenas' son were hired back. And other openings likewise arose shortly thereafter.

Cardenas' discriminatory conduct towards Espinoza leads me to conclude that Respondent is in violation of Labor Code Sections 1153(c) and (a) of the Act in failing to rehire Espinoza back the first week of May, 1980.

## IX. REFUSAL TO REHIRE ELADIO AGUIRRE AND ALBERTO SANCHEZ

### A. Facts

#### 1. Eladio Aguirre

Eladio Aguirre (a/k/a "El Raton") testified that he first worked for Respondent in November 1976 cutting and packing lettuce and that he was hired at the Popular Drugstore in Calexico by Pedro Juarez, then a pusher.[71] In 1977 and 1978, Aguirre testified that he was again hired by Juarez, now the foreman, at Juarez' home in Mexicali. Aguirre would work initially in Blythe, then in the Imperial Valley, and then finished up in Blythe.[72] Aguirre finished in Blythe in April 1979 in what turned out to be his last season with Respondent.

In November of 1979, Aguirre testified he went to Juarez' house to apply for the fall season but that Juarez informed him that he had all the workers he needed from the season in New Mexico, adding that there were only eight lines anyway but to keep checking.

Aguirre testified that on the opening day of work he, along with Ramon Diaz, three or four members of the Lozano family, Juan Quintero, Manuel Ramirez and Jose Farias, did check, first at the Popular Drugstore in Calexico (where Juarez had told him to go) but that they were unable to find Juarez. Next he checked at the Standard Station in Calexico, where Respondent's workers also gathered, and that although he didn't see Juarez, he did run into Raul Ramirez, Juarez' pusher. Aguirre testified that Ramirez, after pointing out that only Juarez did the hiring, told him (and the others there) that:

> We have orders to not give you work. I should not be telling you this, because I'm only a pusher. Pedro is the indicated one to tell you, but because he doesn't have balls enough to tell you, this is why I'm telling you so that you won't go around wasting your time." (TR. 6, p. 51.)

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71. The pusher in an assistant to the foreman. He supervises the quality of the lettuce packed and if ordered by the foreman, can discipline workers. In some cases the pusher does the hiring.

72. Aguirre testified the season usually started in Blythe in November, lasting until the end of November or possibly through one or two weeks of December. In December, the season began in the Imperial Valley and lasted until the end of February or the first week in March, wehreupon it returned to Blythe, finishing there in April.

Aquirre further testified that Ramirez told the group that they could go to Blythe and check for themselves, which he, with the others, did that same morning. Upon their arrival there, Aguirre testified that he observed many new workers he had never seen before and only eight to ten workers he knew from before.[73] Seeing Juarez, he approached him and asked about the new workers; and Juarez, according to Aguirre, responded: "I do not want to discuss it with you. There's no work for you and that's all."[74] (TR. 6, p. 53.)

Aguirre testified that he stayed around to see if Respondent was really only utilizing eight lines and saw eleven or twelve.

According to Aguirre, when the work came back to the Imperial Valley on December 1, 1979, he tried again to secure employment and to find out when the work was supposed to start.[75] Not finding Juarez at his home, Aguirre testified he checked at a mechanic's shop in Mexicali (called "El Choco") where he encountered him and Juarez is alleged to have said:

> "I do not know what day they are going to start, but I do not want to talk anything over with you because -- right away you will go and file your charges, and the and the state believes all of you and they think we're crazy, therefore, I don't want to talk to you about anything here."[76] (TR. 6, p. 54.)

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73. Juarez confirmed when he testified that there were may new workers and that more new hires had been employed than in previous years. By contrast, Ramirez testified that there were only three new hires.

74. According to Aguirre, one other worker was present for this conversation, a man nicknamed "El Topo". El Topo did not testify.

75. Aguirre, testified that a worker ordinarily hired for the Blytye harvest in November did not have to re-apply for work in the Imperial Valley because this worker would have been notified in Blythe as to what day the next season was going to start. In the Imperial Valley, he would be informed of the spring season in Blythe. Thus, usually if a worker were hired in Blythe in November, he would have work until April.

76. Apparently, the charge he was referring to was the fact that Aguirre filed a charge in November 1979 immediately after he had gone to Blythe and received no work.

Aguirre testified that he was not informed as to the starting date.[77] Aguirre further testified that this December 1, 1979, date was the last time he attempted to get his job back.

Ramon Diaz, a witness for General Counsel, testified that in November of 1979 Pedro Juarez informed him that he had orders not to hire him but that he (Diaz) went to the pick-up point the following day (at the Calexico Standard Station) anyway and while there, in the company of Aguirre, members of the Lozano family, Manuel Ramirez, and Jose Farias, heard Raul Ramirez say that he had orders from Respondent not to "give work to any of the gossipers from Salinas"[78] and that "that was not his job; that it was Pedro Juarez' job, but that Pedro Juarez did not have sufficient balls to tell the people what the company had said." (TR. 6, p. 86.)

Diaz further testified that Ramirez had said Respondent only needed eight lines but that he (Diaz) decided to go to Blythe to see for himself that day where he saw twenty - twenty-one lines working (presumably two crews) and a lot of new people. He testified he only recognized ten - twelve workers from before. He also saw Juarez and asked him for work but Juarez said, "No". Diaz testified that Aguirre, the Lozanos and the others who were at the Standard Station earlier were also present at this time in Blythe.

Union and Concerted Activities

Aguirre testified he had been a supporter of the UFW since 1972 and that he worked as an organizer at Respondent's in 1975, passing out literature and talking about the Union to other workers; he also testified that he passed out Union literature in 1977 and 1978 and was observed by foremen.

Aguirre further testified that he supported the UFW strike in the Imperial Valley in 1979 and that representatives of Respondent were aware that he supported the strike because in November and December of 1978 he passed out flyers to his co-workers at the buses by the Calexico Standard Station, and he even gave some to the foremen, including Ramirez and Juarez. In addition, he testified that sometimes Juarez would sit with him while he was eating and talking about the Union to co-workers, including Ramon and Alberto Sanchez. Aguirre further testified that he participated in a one-day work stoppage to protest the shooting of Rufino Contreras. And Aguirre also described an incident in Blythe during the spring of 1979 in which Union organizers, Marshall Ganz and

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77. Two others, identified as Abel Pizanno and someone named Marshall, were present for this conversation; they did not testify.

78. Diaz had worked for Respondent in Blythe in April, then followed the job to Arizona, and finally worked for Respondent in Salinas in October of 1979. He was never rehired after that.

Celestino Rivas, came into one of Respondent's fields, went from trio to trio, eventually speaking to the entire crew, including Aguirre, and that Juarez and Ramirez observed this from a short distance.

When the Imperial Valley season finished in February 1979, Aguirre testified that he, Alberto Sanchez, and "El Topo" spoke with Al Pena, a supervisor, about whether Respondent would provide bus transportation from Calexico to Blythe,[79] to which Pena supposedly replied that Respondent already provided a labor camp.[80] Aguirre testified he agreed but pointed out that the camp was in bad condition, to which Pena said that he would look into it. Aguirre also testified that this was the first time he had ever spoken to Pena or any supervisor about a work-related problem.

According to Aguirre, because of the lack of bus transportation, he was required to drive with Juarez in his van at a cost of $3.00 per person.

2. Alberto Sanchez

Alberto Sanchez (a/k/a "El Pollo") first worked for Respondent in 1973, packing and cutting lettuce. Since that time, with some variations, Sanchez qould start in Blythe in November, finish the year in the Imperial Valley, and then go back to Blythe. He testified that he usually found out when the season was starting through friends and then would check with the foreman at the places where Respondent usually picked up workers in Calexico, e.g., the Standard Station or at times in 1979, the Shell Station).

Sanchez testified that a week prior to the start of the season in Blythe in 1979 he saw Juarez in Calexico and asked him when the season was going to start and was told it would be within a week. Sanchez testified he then asked for work and was told "I do not know, check it out. I will notify you."[81] (TR. 6, p. 98.) Sanchez admitted that Juarez had been his foreman the previous year and had never notified him as to the starting date for work.

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79. Juarez testified that it was a distance of approximately 95 miles.

80. Respodent apparently only provided initial transportation to those workers residing at its labor camp. Daily transport was not provided.

81. Sanchez testified Juarez knew where he lived because they used to ride together from Salinas, and Juarez would drop him off at his home in El Centro.

Sanchez later checked with Juarez in Calexico as to the starting date to no avail; and shortly thereafter (about two weeks after his first conversation with Juarez in Calexico) he learned that work had already started, so he checked again with Juarez, told him he still had not been notified, and asked him if he was going to be working. Sanchez testified that Juarez told him that there was no chance, that Respondent had too many people, that there would be only eight lines, but to keep checking. According to Sanchez, he checked frequently at the Standard Station, Shell Station and the Bank of America. He also testified that one day Respondent's buses were at the Shell Station so he went over there and spoke with Ramirez personally but was informed that Respondent had sufficient workers, only needed eight lines, that they were complete, and that there was no chance for him.

Sanchez testified he looked for work in the 1979 Imperial Valley lettuce harvest by visiting Juarez' house, and found Ramirez there. When he asked for work, he was told work would be starting soon, that he should check at the Shell Station at a certain time, that there would be eight lines but that he'd get the job if the lines weren't filled. Sanchez testified he went at the appointed hour, but no one from Respondent showed.

A very short time before work commenced in the Imperial Valley, Sanchez again inquired about work at the Shell Station from Ramirez and was told to wait for Juarez, only Juarez did not come. Sanchez testified he tried again on the day work started in the Valley but that this time Ramirez told him that there was no work for him because Juarez had told him not to hire back Sanchez and some of the others who had worked there previously.[82/]

Next, Sanchez attempted to get work by going to the field itself, this time in the company of Union representative, Celestino Rivas and around fifteen others, including Aguirre and Diaz. Sanchez testified that these workers, all of whom had worked at Respondent's before, were determined to see if it were true, as Juarez had represented, that only eight lines were working. According to Sanchez, he saw Juarez and asked him for work but Juarez gave no real answer because, owing to an accident his child had, Juarez had to leave the field. Sanchez saw Pena and Nunez and asked them for work but was told to check with the foreman.

While at the field, Sanchez testified that he observed the work force to be about twelve or thirteen lines and that the majority of workers were new.

Sanchez continued to check at the Shell Station and was finally told again by Ramirez that "higher-ups" did not want him and that Juarez had given the order.

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82. Sanchez testified that Aguirre and Diaz were also checking for work that same day.

Union and Concerted Activities

Sanchez testified that he had supported the UFW in the past but admitted that he had not participated in any direct way on behalf of the Union and indicated that the only thing that he had done was to talk to co-workers during lunch about UFW benefits. Sanchez further testified that he thought Juarez, Ramirez and Nunez overheard these remarks because during lunch they often would eat with the workers.

Sanchez further testified that while in Blythe in April of 1979 UFW organizers Rivas and Ganz came to the field where he was working and greeted him and the rest of the crew.

Pedro Juarez testified that he supervised a crew for Respondent in New Mexico which finished its work on November 4 or 5, 1979 and that he told the crew that he didn't know when the fall season in Blythe would be starting but for them to check at the regular places; e.g., the Popular Drugstore, the Standard Station, and El Choco. At that time he testified that he had been informed by his supervisor, Celestino Nunez, that Respondent would try to have nine or ten lines.

According to Juarez, many of the workers notified in New Mexico, as well as others, did contact him and were told of the starting date. Juarez testified that he started the Blythe season on November 15 with ten lines of 30 workers (C.P. Ex. 1),[83] but that some of those hired failed to appear for subsequent work so that he "had to hire some new people." (TR. 1, p. 63.)

Juarez further testified that Aguirre, whom he had supervised since 1978, came to his home[84] looking for work the fall 1979 season in Blythe three or four days after the season had started, was not given a job then, but was told to check the following Monday at Respondent's bus pickup point. Juarez denied telling Aguirre the number of lines Respondent was going to utilize. According to Juarez, Aguirre never checked back.

As to the Imperial Valley season, Juarez testified that he was informed by Nunez that Respondent was only going to have seven

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83. The payroll record (G.C. Ex. 19) indicates that Juarez started the Blythe season with eleven lines. Juarez' notebook also confirms this.

84. Juarez testified Aguirre had come to his house in the past and been hired.

or eight lines[85] because there was very little lettuce so he notified those that had worked in Blythe to check out the regular places to find out when work would start. Juarez stated that when he himself finally found out, he went every day to the drugstore and El Choco to inform the job applicants of the starting date. He stopped after all the lines were filled. Juarez testified he could not recall how many lines he actually hired but thought it was eight or nine; there were around ten - twelve new employees.

Aguire was not one of those hired because, according to Juarez, Aguirre never asked him about work in the Imperial Valley: "What I recall is that since the time he asked me for work in my home, I did not speak to him ever again."[86] (TR. 10, p. 53.)

Juarez testified that the Imperial Valley started on January 4, 1980 but that because his child had been involved in an accident, he had to leave the field, having been there only one and one-half hours, so that he was unable to say how many lines were working that first day.[87] When he returned to work later that week, there were two crews working; but he still could not recall how many lines were in each crew. He further testified that the crew size increased from two to three at some point but could not recall the date or when it happened. Nor could he recall whether or not the number of lines in his crew in the Imperial Valley ever increased.

Juarez denied ever speaking to Aguirre, Sanchez, or El Topo about the bus transportation problem but did admit that in the fall of 1979 he drove himself and other workers in his van from Blythe to Calexico and that he asked his passengers to make voluntary contributions towards the gas.

Juarez testified that there were a large number of workers looking for work in the 1979-80 Blythe/Imperial Valley lettuce harvests, and he could not recall if Sanchez were one of them.

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85. As an adverse witness for the General Counsel, Juarez had testified earlier in the hearing that Nunez had told him to hire nine or ten lines.

86. When asked on cross-examination whether he recalled seeing Aguirre in Blythe on the first day of the 1979 season, Juarez stated: "I believe I did, but I don't really exactly recall." (TR 1, p. 68.) A short time thereafter he testified: ". . . I really don't recall if I did see him, or if he was there or not." (TR. 1, p. 71.)

87. Juarez did recall seeing Ramon Diaz at the field, that Diaz asked for work and that he informed him that none was available because his lines were filled.

Raul Ramirez testified that in 1979 he was Juarez' pusher and that one of his duties on the first day of the Blythe season was to pick up workers Juarez had hired[88] at the Standard Station in Calexico. However, he denied seeing Aguirre at this time and in fact, testified he did not see him at all at anytime duirng the 1979 Blythe season. As an adverse witness for the General Counsel, he testified that he did not speak to any worker at the Standard Station except for those who had been hired and were coming to work.[89] He did testify he saw Ramon Diaz but did not speak to him; and he recalled running into the Lozano family, not at the Standard Station, but across the street from the Popular Drugstore, that they asked for work, and that he told them to check back.[90] He also testified he told them there would be thirteen lines working that day, but that in fact, only twelve lines worked.

Ramirez also testified that later that same day he recognized the Lozanos and Diaz at the field in Blythe, in a group of about fifteen, but he could not recall if Aguirre or Sanchez were with them. However, (as an adverse witness for General Counsel), he admitted seeing Aguirre later, three to five weeks into the 1979 Imperial Valley season, at a restaurant in Mexicali where Aguirre asked him for work with Juarez' crew (though Ramirez had his own crew) but that he never saw Aguirre again. Ramirez further testified that he did not mention to Aguirre that all the crews were filled and never related this alleged conversation to Juarez. Later in his testimony (on cross-examination), Ramirez added that Aguirre had told him that he was working in Yuma and that as soon as he was through, he would come and ask for work with Juarez.

As regards Sanchez, Ramirez testified that he knew him but could not recall ever speaking with him during the 1979 Blythe Valley season. With respect to the Imperial Valley, Ramirez acknowledged that the Shell Station in Calexico was a pick-up point for workers employed by Respondent in the Imperial Valley, but could not recall if he spoke to Sanchez about work on the first day of the 1980 season. However, he was certain that he did not speak to Sanchez about work in the Imperial Valley following the first day of work.

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88. Juarez testified that he did not hire any members of Juarez' crew in the fall season in Blythe.

89. As Respondent's witness, he testified that he did speak to Sanchez, El Topo, and some other workers at the Standard Station.

90. As an adverse witness for the General Counsel, he had earlier testified that he told them that his crew was complete but that if they wanted to be sure, they could go to Blythe themsleves and check.

Finally, Ramirez further testified that on the first day of work in the Imperial Valley in 1980 both crews contained nine or ten lines and that he recalled seeing a large group of workers at the field that day inquiring about work, including Diaz.

Celestino Nunez, supervisor of Respondent's lettuce harvest since 1973, testified that for the Blythe 1979 season it was decided to begin with two crews, ten lines in each crew, and that he notified Juarez to bring either ten or eleven lines: "I don't recall if it was ten or eleven lines, only. Probably ten . . . Because normally we ask for ten trios. Very rarely do we ask for eleven trios." (TR. 10, p. 8.) Nunez testified that these two crews worked the whole season, and a third crew was also added.[91/]

Nunez also testified that the Imperial Valley harvest commenced on January 4, 1980, with two ground crews but that because of insufficient lettuce production, Juarez was notified to bring reduced lines. Though he couldn't recall how many lines he told Juarez to bring, he testified that it couldn't have been more than ten; and that in any event, only seven or eight lines were actually used. According to Nunez, the original two crews worked all season; and a third was later added, probably between January 5 and January 21, 1980.

Nunez testified that he did not hire any of the work crews; he only hired the foreman and the pusher and that they were in charge of hiring the crews. He denied that in 1979 in Blythe he gave his foremen orders about whom they should hire and whom they should not.

Seniority

Aguirre and Sanchez testified that they believed a seniority system existed at Respondent's because upon hiring, each employee was given a work identifying number. In addition, Aguirre testified that there were two and sometimes three crews; and when the work slowed down, Respondent would keep Crews 1 and 2 and lay off the other crew.

All of Respondent's witnesses denied the existence of a seniority system. Juarez testified that previous experience with Respondent was not important in hiring -- that if a worker showed up on the starting date, he/she would be hired. Juarez added, however, that he would want to hire workers that he knew could do the job.

Likewise, Ramirez testified that workers knew the established places to go to inquire about work, that Respondent told these workers when the season was to start and those that showed up first were hired first.

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91. This was a crew that participated in Respondent's harvest in Chandler, Arizona and then moved to the Imperial Valley. Its foreman was Pedro Flores.

Nunez testified that who was hired was up to the foreman and that he would employ workers wherever he could find them. He further testified that experienced workers were preferred but that experience was not necessarily based upon having previously worked with Respondent. In fact, Nunez added that it would make no difference whether the applicant had previously been employed by Respondent.

Seniority List

Juarez testified that whenever a person applied for a job, he would write down his/her name, address, number of dependents, social security number, date when he/she started working, and date of birth. He would then give the new employee a work number. This information was then written down on a document called a "Hiring Slip", and one copy went to Respondent's main office while Juarez kept the other for himself.[92] In this manner, Juarez maintained a record of all persons that had worked with him. For example, Aguirre's employee number (156J) was taken from Juarez' personal notebook (G.C. Ex. 2, p. 7) and transferred to Respondent's central office files where it appears on his hiring slip. (Jt. Ex. 4, p. 4.)

According to Juarez, when a person applied for a job, he would consult his personal notebook to see if the worker were listed. If so, that person would receive his previous identifying number. If not, Juarez would write down or ask the employee to write down the new information for the hiring slip and give the new worker the next number in order; later he would make the entry in his notebook.

Referring to his notebook, Juarez pointed out that the employee numbers were not in sequence because it was not intended to be a seniority list.

Respondent's Assistant Vice President of Administration and head of its payroll department, Roy Ortiz, testified that because of the possibility of confusion over some employee's names, the central office in Phoenix would assign, in addition to the foreman's number, a computerized four-digit number for the master file, as a further means of employee identification. Thus, the number "6980", immediately above Juarez' 156J entry for Aguirre (Jt. Ex. 4, p. 4) is the master file employee number. According to Oritz, were an employee to quit Respondent but come back two years later to a new crew, he/she would receive a new foreman's employee number but would retain the old master file number.

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92. Juarez also testified that he told employees what their numbers were because their paychecks would reflect that same number.

B. Analysis and Conclusion

There is conflict in the testimony (and among Respondent's own witnesses) as to when Aguirre applied for the fall season in Blythe, the number of lines utilized, whether Aguirre or Sanchez actually applied for work at the regular places, and whether they were seen at the fields with the Lozanos and Diaz. In a 1979 fall Blythe and winter Imperial Valley season marked apparently by sufficient numbers of available workers, including new workers from New Mexico, for limited numbers of jobs, such differences in recollections many be bound to occur. But I find that it is not necessary to resolve these differences because the General Counsel has failed to establish a prima facie case that the refusals to rehire were as a result of Union or concerted activity. To establish that Respondent violated Section 1153(c) of the Act by failing to rehire Aguirre and Sanchez, the General Counsel must establish by a preponderance of the evidence, that Respondent would not have failed or refused to rehire them but for their union membership or union activity. (O.P. Murphy Produce Co., Inc. supra (1981) 7 ALRB No. 37, citing Lawrence Scarrone (1981) 7 ALRB No. 13.

Aguirre's Union activity, particularly in the period immediately prior to the alleged refusal to rehire, was very limited. In Sanchez' case, it was almost non-existent. The General Counsel argues that while working at Respondent's, Aguirre passed out Union materials, spoke openly about the Union in front of company personnel, including Juarez and Ramirez, and supported the UFW strike of other companies by passing out Union flyers to co-workers and foremen. (G.C.'s Post-hearing Brief, p. 10.) Putting aside the fact that Aguirre was not very convincing when he testified on the amount of his Union activity, the record does not reflect much activity beyond around December 1978 anyway, when Aguirre testified he passed out literature in support of the UFW strike in the Imperial Valley. Prior to that, he testified that he had passed out Union literature back as far as 1975 and that in 1975 he had also been a UFW organizer at Respondent's. If Aguirre had been an active supporter of the Union since 1975 and Respondent knew of it, particularly in the 1977-78 period when Aguirre testified he passed out literature to the foremen, what particular reason would Respondent have chosen to wait until November 1979 to prevent his rehire. And it is particularly noteworthy that Aguirre's own testimony reveals very little Union and concerted activity on his part during 1979.

Next, General Counsel argues that Aguirre and Sanchez associated openly with Union organizers Ganz and Rivas, and that this was well known to Respondent. (G.C.'s Post-hearing Brief, p. 17.) Yet, the organizers did not single out Aguirre or Sanchez when they came to the field, but went from trio to trio in an effort to talk to the entire crew.

The General Counsel also contends that Aguirre demonstrated Union support by observing the death of Rufino Contreras, a worker killed in the UFW strike in February of 1979, by not going to work

that day. (G.C.'s post-hearing Brief, p. 11.) But apparently all the members of the crew participated in that one-day work stoppage.

Most of the statements attributed to management representatives, even if true, do not indicate that the reasons for the refusal to rehire had anything to do with Union or concerted activity. References to "gossipers from Salinas" tell us very little as to the real reason Respondent had in deciding not to rehire these workers who had previously been employed by Respondent. But it is significant to point out that many of these more senior employees who were refused employment, like the Lozanos or Diaz, were not shown to have any particular Union affiliation.

Furthermore, General Counsel argues that Aguirre's and Sanchez' inquiries about the lack of bus transportation from Calexico to Blythe in February 1979 were a cause in their being denied employment in Blythe in November 1979. Assuming that Aguirre's, Sanchez' and El Topo's mere inquiry of Pena as to whether Respondent would provide bus transportation to Blythe is to be considered concerted activity, we are faced with the problem of the time lag between February, 1979 when the inquiry was made and the date of the alleged refusal to rehire for the Blythe fall season, November 1979. In any event, I do not find that this activity was the cause of Aguirre's and Sanchez' not being rehired for the fall season. There is no credible evidence that Pena took any action based on the conversation to insure that Aguirre and Sanchez were not rehired. Moreover, I find it curious that General Counsel does not argue that El Topo was ever discriminated against because of the conversation with Pena.

The General Counsel also contends that Juarez' failure to personally notify Sanchez of the beginning of the 1979 season in Blythe was highly suspect. Assuming arguendo that Juarez made such a representation, it is doubtful Sanchez should have relied upon it for rehire. Besides, the General Counsel failed to prove any past practice of Juarez in this regard or even that he had ever notified Sanchez in the past about the starting date for work. What the evidence reflects instead is that Juarez told those that had worked in New Mexico to check with him at the Popular Drugstore when the season was over about the starting date for work in Blythe for the fall, which some did, and that others also checked in some of the traditional places. In Sanchez' case, however, because he chose to wait for personal notification, the fact remains that he showed up for work too late and that the lines had already been formed.

This leaves for consideration Aguirre's testimony that on December 1, 1979, Juarez refused to talk to him about when work in the Imperial Valley would commence on the grounds that to do so would lead to Aguirre's filing charges with the ALRB. The General Counsel argues that this remark was in reference to Aguirre's then pending unfair labor practice charge, which "Aguirre had filed in November against the company for its refusal to rehire him," and cites G.C. Ex. 1(g). (G.C.'s post-hearing Brief, p. 9.) However, a review of that charge indicates that it was not in existence at the

start of the Imperial Valley winter season and was not filed until February 7, 1980, and not served on Respondent until Februrary 11, 1980, as paragraph 3 of the First Amended Compalint asserts. (Respondent would not have been able to tell from the allegation contained in the charge that it was Aguirre who had filed it anyway since there were several other former employees who had unsuccessfully sought work at the same time.) Therefore, Juarez could not have known about the charge at the time he was alleged to have made his discriminatory remark because it had not yet been filed. And there is no record evidence of any other charges having been filed by Aguirre at this time. I therefore cannot credit Aguirre that Juarez made such a statement.

Finally, the General Counsel argues that Respondent's hiring procedure, as well as Juarez' notebook (G.C. Ex. 2), establishes the existence of a seniority system. From this it is contended that Aguirre and Sanchez should have had recall rights superior to junior employes and the fact that they, as experienced workers, were not recalled is evidence of discrimination.

It is true, as General Counsel points out, that Respondent's hiring procedure gives preference to experienced workers in the sense that they, as part of the current work force, would be in the best position to learn early on of either the starting date of the next season or where to go to discover the starting date. Thus, for a worker to know of the starting date, he/she would most likely have to either have worked with Juarez immediately before the season or worked for him at some other period so that he would know the logical places to go to get information as to the starting date. For example, Juarez testified that previous experience was not important in hiring but acknowledged that if workers he had previously notified of the starting date showed up, they would be hired. In this way, the system more or less assures the re-employment of the experienced workers over brand new people. But to say this is not to prove that Respondent has established a recall system based on seniority; it was still based on the principle that the first to report to the known places, no matter how that employee might have found out about such locations, the first to be hired. Respondent did not rehire its employees by way of a recall system.

Nor does Juarez' notebook support General Counsel's position. It did not indicate, for example, that those hired for the fall, 1979 Blythe harvest were notified of their recall or hired in order of seniority. In any event, the book Juarez maintained was inaccurate in parts and somewhat confusing; and it would seem to be unworkable as a seniority instrument. I am satisfied with Juarez' explanations as to the need to maintain a record of who had worked for him and of Ortiz' explanation of the four-digit number system. I find that these methods were for employee identification purposes and did not constitute a seniority system.

While I do not doubt that Aguirre and Sanchez, along with Diaz, the Lozanos, Manuel Ramirez, Jose Farias, Juan Quintero, the

Miranda family, the Chairez family (possibly a total of fifteen or sixteen) were not rehired, subsequently made frequent contact at the established places, and also went to the fields in search of work, what is in doubt is the reason for their lack of success. Except for Aguirre and Sanchez, the General Counsel makes no present allegation that the others mentioned above were ever involved in any Union activity.[93] The most that General Counsel has established is, as Sanchez testified, "higher ups" may not have wanted these more senior workers, and Juarez may have given such an order. What has not been established is the motive behind such an order. ". . . it is axiomatic labor law that an employer may discriminate with respect to hiring or tenure for any reason, or for no reason, so long as its conduct does not tend or amount to interference with employees' section 1152 rights." (O.P. Murphy Produce Co., Inc., supra, at p. 27.)

I recommend the dismissal of this allegation.

93. The original complaint of July, 1980 alleged that, in addition to Aguirre and Sanchez, "Ramon Diaz, _____ Farias, Manuel Ramirez, Juan Quintero, a Gonzalez Family and Does 1-10" were refused rehire because of their Union support. The First Amended Complaint of February, 1981 deleted any reference to the above individuals except for Aguirre and Sanchez but added five members of the Lozano family. (Does 1-14 were also alleged). During the hearing the Lozanos and Does were withdrawn leaving the allegation of discrimination against only Aguirre and Sanchez.

## X. INTERFERENCE WITH AND SURVEILLANCE OF UNION ACTIVITY

### A. Facts

Davis Valles, a full-time volunteer for the United Farm Workers and director of the Watsonville Field Office, testified for the General Counsel that in January/February 1980, between 6:30-7:00 a.m. he and other organizers went to the Shell station in Calexico[94] where Respondent's buses were located in order to speak to lettuce workers about forming a negotiating committee and to receive their ideas regarding contract proposals.[95]

Valles testified that he had previously told supervisor Al Pena, having seen him the day the harvest started at the Calexico pick-up point, that he would be coming out to talk to the workers about the negotiations. Pena made no response, according to Valles.

Upon first arriving, Valles, wearing a UFW identifying badge, boarded several of Respondent's buses, asked the foremen to disembark, which they did, and spoke to the workers inside the bus. However, upon reaching the bus driven by Antonio Roman (a/k/a/ Pecas), a problem was encountered. Valles, in the company of another organizer, Jesus Silva (a/k/a Chuy), requested that Roman, whom he knew from Salinas, get off the bus so that he could speak with the workers. According to Valles, he explained to Roman that he was with the UFW and that the Union was informing workers of the start of negotiations in order to elicit ideas from them. Valles testified that Roman's reply to this was: "Well, I'm not going to get off the bus. I'm not going to get off the bus until the company tells me to get off the bus." (TR. 4, p. 68.) Valles further testified that he told Roman that he had a right to talk to the workers without the surveillance of foremen because the workers would not feel free to ask questions if foremen were around.

Valles decided to go ahead and talk to the workers anyway. Standing on the top step, Valles spoke to fifteen-twenty persons (although the group increased to twenty-five or twenty-six as late arriving workers boarded) for eight or nine minutes. Roman remained seated in the driver's seat the whole time and, according to Valles, made remarks to the effect that there ought to be another election. No worker volunteered to respond following the Valles speech. At

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94. As has been shown, this location was a customary "pick-up point" for workers of Respondent as well as other companies in the vicinity. Many workers would park their cars there and board buses of their respective companies for transport to the fields.

95. This effort was occasioned by the then recently announced Court decision in J.R. Norton v. Agricultural Labor Relations Board (1979) 26 Cal.3d 32, issued on December 12, 1979, which held that Respondent was under a duty to negotiate with the UFW.

around 7:00 a.m. the bus departed.[96/]

Jesus Silva also testified for the General Counsel and basically corroborated Valles. Indicating that the incident happened in January, 1980 at the gas station, he testified that he and Valles, both wearing UFW badges, were organizing Respondent's employees who were boarding buses preparing to be transported to work. He further testified that although other foremen had left the bus when asked to after he identified himself as a UFW organizer, Roman refused to and remained on the bus in the driver's seat for the duration of Valles' speech. Standing on the first step of the bus, Silva testified that he heard no worker respond to the Valles speech.

Neither Roman nor Pena testified for Respondent. The only witness that Respondent called on this matter was Hermalinda Enriques. She described an incident involving her foreman, Antonio Roman, at the Guadalupe Church in Calexico which she said was her pick-up point. Enriques could not relate the date; all she could say was that she started before Christmas, that the event occurred a month later "more or less," that it happened around 8:00 a.m., and that the sun was out. According to Enriques, a UFW representative came to her bus and attempted to speak but because of heckling, was on the bus for less than one minute. She further testified that at this time Roman sat in his driver's seat, then stood at the door for awhile[97/] and did not speak until the Union representative left. She also admitted she was not paying much attention anyway.

B. Analysis and Conclusion

Respondent's defenses to this allegation seem to be: 1) the prior notification of Valles to supervisor Pena at the beginning of the season was not sufficient; 2) that Valles interfered with the operation of the company since he insisted that a foreman leave his bus after the employees had boarded the bus; and 3) that the employees could not have been afraid to speak since there was evidence that one worker asked Valles what he was doing there in that the workers "didn't want the Union".

I do not regard these defenses as legally sufficient to meet the thrust of the allegation. There is no evidence that Roman was engaged in any duties other than awaiting the arrival of all the employees so that he could transport them to the field. Nor is there any evidence that during this time, including the Valles speech, Roman was ready to leave to go to the field so that Valles' continued presence was interfering with Respondent's business operation. Thus, there is no reliable evidence that denial of access to Valles and Silva was necessary in order to maintain

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96. Valles testified that owing to a frost, the work at Respondent's field started a little later, probably 7:30-8:00 a.m.

97. She later testified Roman was seated the whole time.

efficiency, production or discipline. (Peyton Packing Co. (1943) 49 NLRB 828, 845, enf'd., (5th Cir. 1943) 142 F.2d 1009, cert. denied, (1944) 323 U.S. 730.)

In O.P. Murphy Produce Co., Inc. (1978) 4 ALRB No. 106, the ALRB recognized the need of union representatives to engage in post-certification access based upon the right and duty of the exclusive representatives to bargain collectively on behalf of all the employees it represents. The Board stated:

> "As the certified union is the agent and representative of all the employees in the bargaining unit, it is essential that it have access to, and communications with, the unit employees during the course of contract negotiations, in order to determine their wishes with respect to contract terms and proposals, to obtain current information about their working conditions, to form and consult with an employee negotiating committee, and to keep them advised of progress and developments in the negotiations. Reasonable access and adequate communciations between the employers and their bargaining agent is just as essential to meaningful collective bargaining negotiations as is contact and communications between the employer and its attorney, or other bargaining representatives."

Further, during the post-certification period the Union is not limited to the access rules which govern pre-certification access but is instead allowed access at reasonable times and places as necessary to fulfill its bargaining duties. Id.

Thus, I find that Valles and Silva had a valid reason for being at the Shell station in order to talk to the workers boarding Respondent's buses.[98] Respondent, however, while not addressing squarely the post-certification access question does make reference in its post-hearing Brief to its belief that the notification to supervisor Pena was insufficient. However, in what ways the notification was inadequate is not further elucidated.

In my view, Valles complied sufficiently with the O.P. Murphy guidelines to validate his attempt to communicate with Respondent's workers on board Ramon's bus. I credit Valles that he told Pena, a high-ranking supervisor, at the Shell station pick-up point at the start of the harvest that he would be coming out to talk to Respondent's employees about negotiations and that Pena made no response. Valles was entitled to rely upon that silence as approval.

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98. In this case the access to company property question concerns the rights of union organizers to "enter" Respondent's buses. There is no evidence that the pick-up point for the buses -- the Shell station in Calexico -- was owned by Respondent.

I find that Ramon's failure to leave the bus amounted to unlawful surveillance. Although Ramon unquestionably had a valid business justification for being present on the bus during this non-working time at the moment the Union organizers arrived, his continued presence there, after having been asked to leave, was unlawful since he was at that time interjecting himself into the conversation between the organizer and the employees. Ramon's very presence would tend to inhibit the employees' free and open discussion. Scenic Sportswear (1972) 196 NLRB 493. These workers could reasonably have concluded that Roman remained on the bus strickly for the purpose of overhearing the Union organizer's talk.

Surveillance of employees or giving the impression of surveillance is a violation of Section 1153(a) in that it interferes with, restrains, and/or coerces employees in the exercise of their protected rights. Perry's Plants, Inc. (1979) 5 ALRB No. 17. See also, Merzoian Bros. (1977) 3 ALRB No. 62, review den. by Ct.App., Fifth Dist., September 28, 1979.

Respondent's other defense was thought to be the testimony of its witness, Hermalinda Enriques. However, Respondent makes absolutely no reference to it in her post-hearing Brief. Perhaps the reason for this is that it is unclear whether Enriques was discussing the same event about which Valles testified. There were enough distinctions between the testimony of Enriques on the one hand and Valles and Silva on the other to lead to this conclusion; e.g., 1) location -- Enriques described an incident at the Guadalupe Church in Calexico, which is one block away from the Standard station; Valles and Silva described an incident at the Shell station; 2) month -- Valles and Silva testified the event took place around January of 1980; but it cannot be said with any degree of certainty when the incident Enriques was talking about took place; 3) time -- Valles and Silva testified the event took place between 6:30 to 7:00 a.m. on a foggy morning; Enriques testified it was 8:00 a.m. and the sun was out; 4) number of organizers -- Valles and Silva testified that they both boarded the bus; Enriques described an incident in which there was only one UFW representative present.

Furthermore, whatever incident it was Enriques was describing, she also testified that she was sitting in the back of the bus and not paying very much attention.

In any event, I credit the testimony of Valles and Silva over Enriques. They both testified in a straightforward manner, demonstrated good memories of the event, were reasonably precise; and their testimony was mutually supportive, yet did not look to be rehearsed.

Finally, General Counsel believes there is an issue as to whether Ramon is a supervisor under the Act so that his actions would be attributable to Respondent. This is not an issue in the case as the matter was settled when Respondent stipulated at the prehearing conference that Ramon was a foreman in the lettuce harvest. (Prehearing Conference transcript, pp. 3-4). Further, the

matter was not raised as a defense in Respondent's post-hearing Brief, and in fact, even refers therein to Roman as a foreman. (Resp.'s post-hearing Brief, p. 63.)

I conclude that Respondent, by its conduct, has violated Section 1153(a) of the Act.

## THE REMEDY

Having concluded that Respondent has engaged in unfair labor practices within the meaning of Section 1153(c), 1153(d) and 1153(a) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

## ORDER

Respondent, its officers, agents, supervisors and representatives shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by failing or refusing to rehire any such employee or otherwise because of his/her union activities or sympathies.

(b) Giving more difficult work assignments to any agricultural employee because he/she files charges on behalf of another employee with the Agricultural Labor Relations Board or because of his/her union activities or sympathies.

(c) Interfering with or threatening reprisals against any agricultural employee because he/she files charges with the Agricultural Labor Relations Board.

(d) Preventing or interfering with communication between union organizers and employees and engaging in surveillance of employees regarding their union membership, activities, and sympathies.

(e) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Agricultural Labor Relations Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Immediately offer to Jose Espinoza full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other rights or privileges.

(b) Make whole Jose Espinoza for any loss of pay and other economic losses, plus interest thereon at a rate of seven percent per annum, according to the formula stated in J & L Farms 6 ALRB No. 43 (1980), he has suffered as a result of Respondent's failure or refusal to rehire him.

(c) Preserve and, upon request, make available to the Agricultural Labor Relations Board and its agents, for examination

and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back-pay period and the amount of back pay due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its tanslation by the Regional Director into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time between January 9, 1980, and the time such Notice is mailed.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days, in conspicuous places on its property, the period and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: January 22, 1982

Marvin J. Brenner

MARVIN J. BRENNER
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by discriminating against an employee by refusing to rehire him because of his union activity, by giving an employee more difficult work assignments because of his union activity and because he filed charges on behalf of another employee with the Agricultural Labor Relations Board, by threatening reprisals against an employee because he filed charges with the Agricultural Labor Relations Board, and by interfering with and surveilling employees engaged in conversation with union organizers. The Board has ordered us to post this Notice and to mail it to those who worked at the company between January 9, 1980 and the present. We will do what the Board has ordered and also tell you that the Agricultural Labor Relations Act is a law which gives you and all farm workers these rights:

1. To organize yourselves.

2. To form, join, or help unions.

3. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board.

4. To act together with other workers to try to get a contract or to help or protect one another.

5. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do or stops you from doing any of the things listed above.

WE WILL OFFER Jose Expinoza his old job back and we will pay him any money he lost, plus interest computed at seven percent per annum, as a result of his discharge.

WE WILL NOT refuse to rehire or otherwise discriminate against any other employee with respect to his or her job because he or she belongs to or supports the UFW or any other union.

WE WILL NOT give more difficult work assignments to employees because they file charges with the Agricultural Labor Relations Board.

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WE WILL NOT threaten employees because they file charges with the Agricultural Labor Relations Board.

WE WILL NOT interfere with or surveil communications between employees and union organizers.

DATED:

J. R. NORTON

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE